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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 41

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OF THE

SUPREME COURT

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*JUDGE BEAN was Chief Justice until July 1, 1902, when he became Associate Justice, having been re-elected.

†JUDGE MOORE became Chief Justice July 1, 1902.

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OREGON.

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Argued 25 February; decided 17 March, 1902.

BANK OF COLUMBIA v. PORTLAND.

[67 Pac. 1112.]

GENERAL RULES OF STATUTORY CONSTRUCTION.

1. Proceedings not according to the course of the common law, by which the title of property may be devested, must be conducted with at least a full compliance with the statute; and where a special power is granted, and a mode prescribed for its exercise that mode must be essentially followed or the proceedings will be void. The acts required by the prescribed mode are conditions precedent to a valid exercise of the power conferred.

STREETS—REQUIRED NOTICE OF INTENTION TO IMPROVE.

2. Under a city charter authorizing the common council to improve the streets, and requiring that before any street improvement shall be made the council "shall pass a resolution of intention so to do, and describing the work or improvement" (Portland Charter, 1898, §§ 127, 128; Laws, 1898, pp. 101, 150, 151, §§ 127, 128), a resolution "that notice be given that the Common Council of the City of Portland propose to improve" certain streets, followed by a specification of how the work should be done, is a sufficient though not very lucid resolution of intention to improve.

STREETS—PUBLISHED NOTICE OF PROPOSED IMPROVEMENT.

3. Under a city charter prescribing that before any street improvement shall be made the resolution declaring the intention to improve shall be published, etc. (Portland Charter, 1898, § 128; Laws, 1898, pp. 101, 150, § 128), a publication: "Notice is hereby given that the Common Council of the City of Portland propose to improve" stated streets in a specified manner is sufficient.

MEANING OF CONSECUTIVE PUBLICATION—STATUTES.

4. Under the provision of the act of 1899, relating to publication of notices (Laws, 1899, p. 233, § 1), a publication is "consecutive" if it is published on

successive days, Sundays excepted; thus, a notice required to be published for ten consecutive days in a daily paper is sufficiently published when it has appeared in each successive issue from the fourth to the fifteenth of a month in a paper issued every day except Sunday.

STREETS—POSTED NOTICES OF PROPOSED IMPROVEMENT.

5. Under a statute requiring a certain notice to be posted in a specified place, "headed in letters not less than" a prescribed size (Portland Charter, 1898, § 128; Laws, 1898, pp. 101, 151, § 128), the letters used in the heading absolutely must be at least as large as the size required, or jurisdiction will not be acquired to proceed.

STREETS—REMONSTRANCE NOT A WAIVER.

6. The filing of remonstrances by abutting property owners against a proposed street improvement does not constitute a waiver of the requirements of the city charter with respect to the manner and form of giving of notices of the proposed improvement, such requirements being conditions precedent to the city's jurisdiction to lawfully make the improvement.

POWERS OF DEPUTY OFFICER—AMENDING RETURN.

7. Where a city charter provided for a city engineer and deputies clothed with the powers of the engineer, a deputy engineer posting notices of a proposed street improvement required to be posted by the city engineer may make the required affidavit of such posting; and may, under appropriate circumstances, amend a return to make it speak the truth.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by the Bank of British Columbia and others against the City of Portland and another. From a decree for defendants, plaintiffs appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. Parrish L. Willis*.

For respondents there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Duniway*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to enjoin the collection of assessments for a street improvement, based upon the alleged nonobservance of certain charter regulations in doing the work. In the view we have taken of the controversy, it will be necessary to discuss such questions only as may pertain to the notice attending the resolution of intention to make the improvement. On May 2,

1899, the common council adopted the following: "Resolved, That notice be given that the Common Council of the City of Portland, Oregon, propose to improve Tenth Street from the north line of Hoyt Street to a point 20 feet north of the south line of Northrup Street," etc., specifying the manner in which the work should be done; and, on the 4th, caused a notice to be published in the *Evening Telegram*, and in each succeeding and consecutive issue thereof, to and inclusive of the 15th day of that month, which runs as follows:

"PROPOSED IMPROVEMENT OF TENTH STREET.

"Notice is hereby given that the Common Council of the City of Portland, Or., proposes to improve Tenth Street, etc. (specifying the manner in which the work should be done as in the resolution). Remonstrance against the above improvement can be filed on or before the 26th day of May, 1899."

On the fifth, A. M. Shannon, deputy city engineer, posted a notice at each end of the proposed improvement, headed, "Notice of Street Work," in letters about three fourths of an inch in length, stating the fact of the passage of the resolution of intention to improve, its date, the character of the work or improvement proposed, and the time within which objection or remonstrance might be made thereto, and filed his affidavit of the posting with the auditor on the same day. This (affidavit) was admittedly defective, and, to correct which, he filed another on December 20, 1900, after the suit had been instituted, in tenor following:

"OFFICE OF THE CITY ENGINEER,
Portland, Oregon, December, 1900.

I, A. M. Shannon, Deputy City Engineer of the City of Portland, after having first been duly sworn, depose and say that notice of the contemplated improvement of Tenth Street, from N. line of Hoyt Street to a point 20 ft. N. of S. line of Northrup St., provided for in the resolution of the common council passed on the 2d day of May, 1899, a true copy of said notice, marked 'Exhibit A,' is attached hereto and made a part hereof, was posted by me, in compliance with section 128 of the city charter, on the 5th day of May, 1899,

at the following places: S. E. corner of Northrup and Tenth streets, and N. W. corner of Hoyt and Tenth streets. I make this amended proof to correct a clerical mistake in proof made May 5, 1899. A. M. SHANNON, Deputy City Engineer.

Subscribed and sworn to before me this 20th day of December, 1900.

THOS. C. DEVLIN, Auditor,
By W. L. GOULD, Deputy."

Prior to the 26th the plaintiffs, except the University Land Co., all of whom are abutting property owners, filed a remonstrance against the improvement, notwithstanding which it was ordered, and the assessments finally made.

Now it is contended (1) that the resolution of intention is not such as the charter requires; (2) that the published notice thereof was insufficient; (3) that it was not published for the requisite time, and in the manner prescribed; (4) that the posted notice of such work was not headed in letters of an inch in length; and (5) that no sufficient affidavit was made of the posting. Of these in their order.

1. By section 127 of the city charter of Portland (Laws, 1898 pp. 101, 105), the common council is authorized and empowered to improve the streets and alleys of the city; but section 128 prescribes that, before any work is done or improvement made as authorized by section 127, the common council "shall pass a resolution of intention so to do, and describing the work or improvement, which resolution shall be posted conspicuously for ten days in the office of the auditor, and shall be published for ten consecutive days in a daily paper published and circulated in the City of Portland. The city engineer shall, within three days from first publication of the notice herein provided for, also cause (the same) to be conspicuously posted at each end of the line of said contemplated work or improvement. Said notice shall be headed 'Notice of Street Work,' in letters not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution aforesaid, its date, and briefly the character of the work or improvement proposed, and the time within which written objection or remonstrance may be made thereto. The engineer shall file with the auditor an affidavit of the posting of

said notices, stating therein the date and place where the same have been posted." Proceedings in derogation of the common law, by which individuals and citizens may be divested of title to property, must be conducted in substantial if not strict compliance with the requirements of the statute, and every requisite designed for their protection and benefit must be observed in all its essential parts. This is a general rule so well settled that it requires no further elucidation. Another familiar principle is that where a power is granted by the legislature, and a mode prescribed for the exercise thereof, the mode becomes the measure of the power, and any essential deviation therefrom will render the act void and ineffectual. The acts required by the mode prescribed become conditions precedent to a valid exercise of the power, and, without their observance, all subsequent proceedings are without competent authority and wholly unavailable for the consummation of the ultimate purpose: *Springfield Mill. Co. v. Lane County*, 5 Or. 265; 15 Am. & Eng. Ency. Law (1 ed.), 1042; *Gilman v. City of Milwaukee*, 61 Wis. 588 (21 N. W. 640); *Zottman v. San Francisco*, 20 Cal. 96 (81 Am. Dec. 96); *First Presbyterian Church v. City of Ft. Wayne*, 36 Ind. 338 (10 Am. Dec. 35); *Hewes v. Reis*, 40 Cal. 255; *Merritt v. Village of Portchester*, 71 N. Y. 309 (27 Am. Rep. 47). By the very wording of section 128, the requirements thereof are made conditions precedent to the exercise of the power accorded the common council to improve streets and alleys, and, by the settled canons of interpretation, they should receive a strict construction. By this is meant that every requirement must have been observed and complied with in substance, and where the statute, by positive language, inhibits any deviation from the particular mode pointed out, it must be literally fulfilled, as none other can subserve the purpose of the legislature.

2. The especial criticism of the resolution is that it is not within itself a resolution of intention to improve, but that it was thereby determined and declared that a notice be given of the common council's purpose to improve. The purpose or intention is manifest from the resolution, while it may be

conceded that the wording is somewhat inapt and ambiguous.

3. The trouble arises from an attempt to direct that notice thereof be given at the same time, but it does not, in our opinion, destroy the utility of the resolution. The posting and publication of the resolution were matters to be observed after its adoption, and it was not essential that the common council should direct that these things be done in the resolution itself or at all. The charter does this, and nothing more is required. It is the resolution that must be posted in the office of the auditor and published, not another notice. Then it is designed that the posting and publication shall impart notice; so that the published notice, so-called, was sufficient, being practically a publication of the resolution adopted.

4. As to the time of publication, the resolution was inserted in the issue of the *Evening Telegram* of May 4th, and was published in each successive issue to and inclusive of May 15th (1899). The paper was issued every day except Sundays, and the charter requires a publication for ten consecutive days. From the 4th to 15th two Sundays intervened, and there was no publication, of course, upon these days; and the inquiry presented is, was there a publication for ten consecutive days, within the meaning of the charter? Construed within itself, we should say, "No;" but there was enacted in 1899 a law to cure defective publications of notice, and to declare what shall be a sufficient publication thereof, which provides that, where a notice is required by any general or special law to be published in a daily paper for successive or consecutive days, it shall be a full compliance, within the meaning of the law, if such notice is, or should have been, published on the week days only: Laws, 1899, p. 233. This we hold to be curative of the objection made, as it pertains to the length of time the resolution was published.

5. The further requirement of section 128 is that the city engineer shall, within three days from the first publication of the notice, which evidently means the resolution, also cause "(the same)" to be conspicuously posted, etc. It will be noted that the words "the same" are contained in parentheses,

denoting an interpolation. They are not in the original bill as introduced and passed, as we have ascertained by an inspection thereof. The clause, however, does not make sense without some interpolation, as there was evidently an omission by the draftsman. It would be much more in consonance with the context of the whole section if the words "a notice" were inserted instead. This would relieve the section of an apparent incongruity brought about by the indiscriminate use of the terms "resolution" and "notice." At any rate, it is plain that the notice required to be headed, "Notice of Street Work," does not refer to the resolution, as the former is required to state the fact of the passage of the resolution "afore-said" (another document), and to state further the character of the work or improvement proposed, whereas the resolution must describe the work of improvement; thus showing an intentment that the two documents should be distinct one from the other. Now, it is prescribed how the notice shall be headed; that is to say, it shall be in letters not less than one inch in length. The direction is absolutely inhibitive of the use of letters of any less dimension, and there is no room for saying that the use of a three-quarter inch type is a substantial compliance, because the legislature, by express terms, requires a literal compliance. Such a rendition and execution of the requirement of the charter may seem technical, but it is not for the courts to declare that a nonessential which the legislature has prescribed, and in language that cannot be misinterpreted or misunderstood, to be an essential. In this connection a further reference to the authorities will not be amiss. Mr. Elliott, in his work on Roads and Streets (2 ed.), § 324, says: "The form of the notice is not important unless the statute expressly prescribes a particular form, but the substance of the notice must, in all essential features, be such as the statute requires." So, in *Wilson v. Inhabitants of Trenton*, 53 N. J. Law, 645, 647 (23 Atl. 278, 279, 16 L. R. A. 200), the court say: "The legislature may prescribe how such notice may be given. The mode prescribed must be strictly followed, and the proceedings must show the prescribed notice."

And again, in *Harbeck v. City of Toledo*, 11 Ohio St. 219, 224: "The court has no discretion as to the form of the notice. It must contain, or be accompanied by, a copy of the application, and it is idle to speculate as to the object of the enactment, and what would be a sufficient compliance with its spirit, rather than its letter. The language of the act is clear, distinct, and unambiguous,—a copy of the application must be published with the notice of the time and place; and we are not at liberty to disregard its express requirement, or to fritter it away by mere rules of construction. If a municipal corporation avails itself of the statute to take private property without the owner's consent, it must, as we have seen, strictly follow its provisions." See, also, *State v. Shreeve*, 15 N. J. Law, 57; *White v. Bayonne*, 49 N. J. Law, 311 (8 Atl. 295); *Austin v. Allen*, 6 Wis. 134. What notice should be given, and the manner in which it shall be given, are matters within legislative discretion; and the courts cannot inquire as to the reasons which prompted its action, or do less than to require an observance of its mandates, unless contrary to the fundamental law.

6. Nor was there a waiver of the compliance on the part of the common council by those of the plaintiffs who filed a remonstrance against the improvement. The act of giving notice in the manner prescribed was a condition precedent to the acquirement of jurisdiction of the subject-matter, and the improvement could not be lawfully made without it: *Ladd v. Spencer*, 23 Or. 193 (30 Pac. 474); *Strout v. Portland*, 26 Or. 294 (38 Pac. 126); *Smith v. Minto*, 30 Or. 351 (48 Pac. 166).

7. The engineer's affidavit of the posting states the date and places where the notices were posted, and fulfills the requirement of the charter. That it was made by the deputy city engineer is not objectionable, as the engineer may, under the charter, employ one or more deputies, who are clothed with like powers as the principal: Section 53, City Charter (Laws, 1898, pp. 101, 122, § 53). The later affidavit was but an amendment of proof, and a correction of the former.

The objections, therefore, to the affidavit are not well taken;

but, for the omission in posting a proper notice at each end of the line of the proposed improvement, the decree of the trial court will be reversed, and one here entered restraining the collection of the assessments. REVERSED.

Argued 15 January; decided 27 January, 1902.

STATE v. COLESTOCK.

[67 Pac. 418.]

RAPE—RESISTANCE OF PROSECUTRIX.

1. It is not necessary that the person assaulted should have resisted to the uttermost of her ability to support a charge of rape—it is enough if the act was accomplished by force, without consent, and against a genuine resistance.

PRESUMPTION—PART OF EVIDENCE IN BILL OF EXCEPTIONS.

2. Where the bill of exceptions does not contain all the evidence on a certain point it will be presumed that there was sufficient received on that subject to support the verdict: *State v. Gardner*, 33 Or. 150, cited.

From Washington: THOS. A. McBRIDE, Judge.

Ezra Colestock, feeling he has not received justice by a sentence of twelve years in the penitentiary, appeals from a conviction of rape. AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Geo. R. Bagley and Schuyler C. Spencer*.

For the state there was a brief over the names of *Harrison Allen*, District Attorney, and *E. B. Tongue*, with an oral argument by *Mr. D. R. N. Blackburn*, Attorney-General, and *Mr. Allen*.

MR. JUSTICE MOORE delivered the opinion.

The defendant, Ezra E. Colestock, was convicted of the crime of rape, alleged to have been committed by forcibly ravishing a female named Mary E. Thompson; and, having been sentenced to imprisonment in the penitentiary for the term of twelve years, he appeals, assigning as error the action of the trial court in refusing to charge the jury as requested, and in

giving an instruction of which he complains. To render the alleged error intelligible, it is deemed necessary to detail the facts disclosed by the transcript. The bill of exceptions does not purport to contain all the evidence given at the trial, but states, in effect, that the state introduced testimony tending to show that on March 6, 1900, between 8 and 9 o'clock P. M., the prosecuting witness, who was nineteen years old, voluntarily accompanied the defendant from the business section of Hillsboro, along the public streets, to the residence part of that city, where, within one block from an occupied dwelling, and two blocks from her father's home, she was forcibly ravished by the defendant; that when the assault was being made upon her she gave an outcry, which was heard by a witness who was within 25 feet from the scene, but that no other person heard her; that after the commission of the offense she returned with the defendant to the business part of said city, and on the same evening, after separating from him, made statements incriminating him, and on the next day lodged a complaint against him, and that she became sick in consequence of such intercourse; that the defendant, to rebut the evidence of rape, introduced testimony tending to show that the prosecutrix voluntarily accompanied him to the place described by her, where, after sitting in his lap about fifteen minutes, he had intercourse with her with her consent; that they thereupon returned to the business part of the city, where they separated; that as they were returning, and within ten minutes after the commission of the offense, they met her brother, to whom she made no complaint, though she told him thereof the next evening; that the next day after the intercourse she denied to a witness that she had been ravished; and that the defendant was not arrested for the commission of the alleged crime until January 5, 1901.

The instruction which the court refused to give at defendant's request is as follows: "You are further instructed, gentlemen of the jury, that, before you can find the defendant guilty as charged in this case, you must be satisfied from the evidence, beyond a reasonable doubt, that the prosecutrix re-

sisted the defendant to the full extent of her ability and strength from the time the defendant commenced the attempt to have intercourse with her till said act was accomplished, and that she at no time consented thereto during said time; and, if she upon that occasion at any time consented to have intercourse with said defendant, he would not be guilty of the crime of rape, and your verdict should be, 'Not Guilty.' "

The instruction complained of is as follows: "Before you can convict the defendant of rape in this case, you must find that he, before the time of the indictment, had carnal knowledge of her, and did it by force, she at no time consenting to the act of intercourse; and, if she at any time consented to the intercourse, he would not be guilty of rape. There must be honest, actual, *bona fide* resistance. She must have used force to prevent him, the best she could. It must have been by force and against her will, and at no time consented to. So, if it was begun by force, and she actually consented before the act was completed, it would not be rape. The state must show beyond a reasonable doubt, before they can convict, that the act was committed by force and against the will of the prosecutrix, if committed at all." Exceptions having been reserved to the court's action in this respects, it is contended by defendant's counsel that error was committed in refusing to charge the jury as requested, and in giving the instruction complained of.

1. Considering these alleged errors in the order of their assignment, defendant's counsel, in support of the point for which they contend, rely upon the case of *People v. Dohring*, 59 N. Y. 374 (17 Am. Dec. 349), in which it was held that the court erred in the trial of an indictment for forcibly ravishing a woman, in refusing, when so requested, to charge the jury that, before the defendant could be convicted of rape, they must be satisfied from the evidence that she resisted him to the extent of her ability on the occasion. They also cite *People v. Morrison*, 1 Parker, Cr. R. 625, in which it was held that, to warrant a conviction for rape, it ought to appear that there was the utmost reluctance and the utmost resistance on the part of the female, in speaking of whom Mr. Justice

HARRIS says: "The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her feet and hands with which she could kick and strike, teeth to bite, and a voice to cry out. All these should have been put in requisition in defense of her chastity."

We cannot give our consent to such a harsh doctrine, and think the better rule, and the reason upon which it is founded, are announced in *State v. Shields*, 45 Conn. 256. Mr. Chief Justice PARK, speaking for the court in deciding that case, says: "The defendant requested the court to charge the jury that, to constitute the crime of rape, it was necessary that the prosecutrix should have manifested the utmost reluctance, and should have made the utmost resistance. The court did not comply with this request, and the refusal to do so is made a ground for asking a new trial. While it may be expected in such cases, from the nature of the crime, that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold, as matter of law, that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which made resistance utterly useless; and other causes may have prevented such extreme opposition and resistance as the request makes essential. This importance or resistance is simply to show two elements in the crime,—carnal knowledge by force by one of the parties, and nonconsent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making,

would be a reproach to the law as well as to common sense. Such a test it would be exceedingly difficult, if not impossible, to apply in a given case. A complainant may have exerted herself to the uttermost limit of her strength, and may have continued to do so till the crime was consummated. Still, a jury, sitting coolly in deliberation upon the transaction, could not possibly determine whether or not the limit of her strength had been reached. They could never ascertain to any great degree of certainty what effect the excitement and terror may have had upon her physical system. Such excitement takes away the strength of one, and multiplies the strength of another. The request, in substance, is as follows, that inasmuch as nonconsent is to be proved by the resistance made, therefore, if the resistance falls short of the extremist limit that could have been made, the deficiency necessarily shows consent, and should be so charged as matter of law. The fallacy lies in the assumption that the deficiency in such cases necessarily shows consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would show consent; but, without such intent, it shows nothing important whatsoever. The whole question is one of fact, and the court committed no error in so leaving it to the jury."

It is contended that the instruction given by the court of its own motion does not properly state the law in reference to the measure of resistance necessary on the part of the prosecutrix in a case of this character, and that the transcript shows that, if she had made any opposition to his advances, she could have secured help from the persons living in the houses near which the offense was committed. As the bill of exceptions does not purport to contain all the testimony given at the trial, it is impossible to state what force may have been used or threats made by the defendant to accomplish his purpose. While it appears that she voluntarily accompanied him from the business section to the residence part of the city, it will be remembered that she was going in the direction of her home. Her outcry when assaulted was heard by a witness who was within

25 feet from the place where the outrage was committed, but it cannot be ascertained from the bill of exceptions why he did not go to her relief, unless it may be inferred from the verdict that her cry for help was suppressed by her assailant, so that in the darkness the attention of the witness was not particularly attracted by her indistinct entreaty for deliverance; and, if she were by such means unable to summon aid when so near, how could it be expected that she would be heard by the residents of the houses a block or more away? After the offense had been committed, she went with the defendant to the business section of the city, in going to which she met her brother, to whom she made no complaint; but the transcript fails to show the age or manly vigor of her relative, or what threats may have superinduced her return, or prevented her from telling her brother at that time of her shame, and of the author of her dishonor.

2. What has been here said is not intended as a review of the evidence, which has not been brought up, but to show that, in the absence of all testimony in respect to threats and the degree of force used, it will be presumed that the verdict was supported by evidence, and that the judgment is according to law: *State v. Gardner*, 33 Or. 150 (54 Pac. 809); *State v. Tucker*, 36 Or. 291, 306 (61 Pac. 894, 51 L. R. A. 246).

The instruction given by the court is certainly as liberal as the defendant was entitled to expect, and hence the judgment is affirmed.

AFFIRMED.

Argued 4 February; decided 24 February, 1902.

BRENTANO v. BRENTANO.

[67 Pac. 922.]

TAXATION—ASSESSMENT AND SALE IN SEPARATE PARCELS.

1. The general scheme of taxation in force in Oregon in the years 1895 and 1896, as indicated by Hill's Ann. Laws, §§ 2815, 2816, 292, 2770, 2814, 2823, 2825, 2826, 2838, was one requiring separate parcels of realty to be separately listed for taxation, and where lots widely separated are listed and sold together for a lump sum the proceeding is void, and a tax deed based on such an assessment conveys no title.

TAXATION—OVERCOMING PRESUMPTION OF REGULARITY.

2. Though, under Hill's Ann. Laws, § 2823, making a tax deed *prima facie* evidence of the regularity of the proceedings, the burden is on the person attacking a deed to prove the irregularity, the return of the sheriff on the tax roll showing such fact is sufficient to vitiate the deed.

REDEMPTION FROM TAX SALE—TENDER OF SUM DUE.

3. Hill's Ann. Laws, § 2846, provides that where land is conveyed prior to the date of the warrant authorizing the collection of taxes thereon the grantee shall pay the taxes. *Held*, that where two thirds of a tract of land was conveyed to defendants before the date of the warrant, and the whole tract was afterwards purchased by them at a sale for taxes, which was void for irregularity, a tender to defendants of one third of the amount of the tax was sufficient to authorize the owner to bring suit to cancel the deed.

From Marion: REUBEN P. BOISE, Judge.

This is a suit by J. F. T. B. Brentano against his brother C. F. Brentano to cancel a tax deed. Plaintiff, being the owner in fee and in possession of the west half of the Jean Jeangras donation land claim, No. 79, situate in sections 14 and 23, township 4 south, range 3 west of the Willamette Meridian, conveyed, on February 13, 1896, the east two thirds thereof to the defendant and one R. L. M. Brentano. The whole of this tract, together with two certain lots in the Town of St. Paul, were assessed to the plaintiff upon the assessment roll for Marion County, Oregon, for the year 1895, but in separate parcels; the land being valued at \$1,500, and the lots at \$200. On March 26, 1896, a warrant was issued to the sheriff of said county for the collection of taxes due upon said roll, and on December 11, 1896, another warrant was issued and attached to the delinquent list, requiring the sheriff to make the taxes

remaining upon the said list by levy and sale of the property, as required by law. Under this warrant the sheriff levied upon and sold at public auction both land and lots *en masse*, to satisfy the whole of the taxes assessed against them, one J. K. Marley becoming the purchaser for the sum of \$29.27, who received from the sheriff a certificate of sale. This certificate was assigned to P. H. Marley, and by him to defendant. In due course, and after the time for redemption had expired, the sheriff executed a tax deed to the defendant for the whole of said property so sold. On July 22, 1899, the plaintiff tendered to the defendant \$19.50, in payment of one third of the taxes assessed against the land and attendant costs and expenses and the whole of the taxes assessed against the lots. He subsequently brought this suit to cancel said tax deed as a cloud upon his title to the west third of the west half of said donation land claim, the portion thereof remaining after the conveyance by him to defendant and R. L. M. Brentano as above noted, claiming that the deed is void for certain irregularities in the assessment and sale of the property for the taxes so levied, one of which is that the property was sold *en masse* by the sheriff, and not in separate parcels, as required by law. The plaintiff had a decree in the court below, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *W. M. Kaiser*, *W. T. Slater*, and *Tilmon Ford*, with an oral argument by *Mr. Kaiser*.

For respondent there was a brief and an oral argument by *Messrs. B. F. Bonham*, *John A. Jeffrey*, and *Carey F. Martin*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. It will be recalled that the land was assessed in one parcel and the lots in another, and it is admitted that they are situated one and three quarter miles apart, so they cannot be considered, under any circumstances, as one parcel. The sheriff

made the sale *en masse*, and the defendant purchased for a gross sum. This is shown by the officer's return. The deed is the result of the sale made in the manner indicated, and the question is whether it is void for irregularity. The contention in support of the deed is that it is the intention of the statute that sales of realty for taxes shall be made in separate parcels or otherwise, as it may appear likely to bring the highest price, within the discretion of the officer making the sale, and that the law has been pursued in the case at bar. The reasoning proceeds upon a collocation of Hill's Ann. Laws, §§ 2815, 2816, and 292. The first two sections provide that a warrant for the purpose of collecting delinquent taxes shall be deemed an execution against property, and shall have the force and effect thereof against any person, firm, or corporation upon whom such taxes are levied or charged on the roll, and shall be executed and returned in like manner, except as in chapter XVII otherwise provided; and that, if sufficient personal property be not found to satisfy the same, it must be levied upon any real property of the person, firm, or corporation, or sufficient thereof to satisfy the same, including fees of officers, etc. The last relates to the manner of sale under an execution, and provides that when the sale is of real property, consisting of several known lots or parcels, they shall be sold separately or otherwise, as is likely to bring the highest price; hence it is concluded that the manner of sale, whether in parcels or *en masse*, is a matter resting entirely within the discretion of the sheriff. This has not been the practice, and when we come to take into consideration other sections of the statute relating to taxation it would seem that such was not the true intendment of the law. We call attention more especially to Hill's Ann. Laws, §§ 2770, 2814, 2823, 2825, 2826, 2838. These make it incumbent on the assessor to list real property in tracts or parcels, and denote the value of each. When the delinquent list is returned to the county clerk, he is charged with the duty of making therefrom a true and correct list of the taxes remaining unpaid, and to whom charged, with a description of the

land and lots, and deliver the same to the sheriff, with warrant attached, directing him that, if no goods or chattels of the delinquent taxpayer be found, then to levy upon the real property as set forth in the tax list, or so much thereof as shall satisfy the amount of taxes charged with the costs, etc. Before sale the sheriff must give notice by advertisement, describing accurately the lots or land to be sold; and he must make a return specifying the amount for which each lot or parcel was sold, with the name of the purchaser; and the tax deed must contain a description of the property sold, as in the tax roll. The last of the sections noted provides for the payment by lien holders of the taxes assessed against the lands involved, which is thereby made to constitute an additional lien thereon in favor of such lien holders.

The idea seems to be prevalent of keeping and treating each parcel as distinct one from another from the inception of the listing and valuation to the sale and conveyance under the tax deed. Where the lien of a judgment has attached to given parcels or lots, and the property sold under execution, the statute has received construction in consonance with this idea in so far as to permit the purchaser at an execution sale to relieve the particular property from the burden of taxes assessed against the judgment debtor, although he owned and was assessed with other realty at the time, by tendering and paying the taxes assessed against the particular parcels or lots (*McNary v. Wrightman*, 32 Or. 573, 52 Pac. 510), and it is in accord with the prevailing rule. Mr. Justice MOORE says in *Bays v. Trulson*, 25 Or. 109, 116 (46 Am. & Eng. Corp. Cas. 368, 35 Pac. 26): "It is a well-recognized principle that the sale of property for the payment of delinquent taxes should be made of the parcels of land as they appear in the assessment roll, and to group lands in the sale which are so assessed as separate tracts, even though owned by the same person, will render the sale ineffectual to convey the title": citing *Cooley*, Tax'n (2 ed.), 493; *Burroughs*, Tax'n, p. 302; *Blackwell*, Tax Titles (5 ed.), § 526. To these may be added *Hayden v. Foster*, 13 Pick. 492, and *Barnes v. Boardman*, 149 Mass. 106 (21

N. E. 308, 3 L. R. A. 785). The purpose, no doubt, is to enable the taxpayer to redeem each parcel by paying the amount of the tax which it is made to bear. But if the tax collector is permitted to sell several parcels *en masse* to satisfy the gross sum assessed against the whole, the very object of a separate listing and valuation fails, and the entire real property of the taxpayer, whether consisting of known parcels or not, may as well be treated as a single item from the very beginning. We conclude, therefore, that the grouping of the acreage property assessed as one parcel, and the lots in St. Paul as another, and making sale of the whole for the gross assessment and for a lump sum, invalidates the tax deed and that the same should be declared void.

2. A sheriff's tax deed is made *prima facie* evidence, under the statute, of the regularity of the tax proceedings, including the sale. This has the effect to throw upon the plaintiff the burden of substantiating the irregularity complained of, whereas, without such a statutory provision, it would have been incumbent upon the holder of the deed to show the regularity of the proceedings from the time of the inception of the assessment to the execution of the deed: Hill's Ann. Laws, § 2823; *Strode v. Washer*, 17 Or. 50 (16 Pac. 926); *Harris v. Harsch*, 29 Or. 562 (46 Pac. 141). But in the case at bar the sheriff's return sufficiently shows the irregularity relied on by plaintiff to vitiate the conveyance.

3. Prior to the issuance of the warrant for the collection of taxes for the year 1895, plaintiff conveyed the east two thirds of the tract assessed to the defendant and another brother. Under the statute (Hill's Ann. Laws, § 2846,) this imposed upon the grantees the burden of paying the taxes assessed against the premises conveyed to them; hence the tender to the defendant of one third of the amount assessed against the whole premises and attendant costs was sufficient as a prerequisite to bringing the suit.

There was a contention that the complaint was insufficient to present the question thus treated and decided, but it sets up the insufficiency of the return of the sheriff as not showing a

separate sale of the parcels, and, while not a model pleading, it must be treated as at least an imperfect statement of a good cause, and accorded a liberal intendment. The decree of the trial court will therefore be affirmed. **AFFIRMED.**

Argued 3 March; decided 24 March, 1902.

STATE v. KELLY.

[68 Pac. 1.]

CRIMINAL INFORMATION—ALLEGATION OF VENUE.

1. Where an information for assault with intent to kill charged that accused on a certain date, in a certain county, "then and there being armed with a dangerous weapon, did then and there feloniously assault one L with such dangerous weapon," is sufficiently definite in its allegations of time and place, for the phrase "then and there being armed" refers quite clearly to the date of the offense, and not to the date of the information.

CRIMINAL INFORMATION—ACTS CONSTITUTING THE OFFENSE.

2. Within the meaning and fair construction of Hill's Ann. Laws, § 1268, subd. 2, requiring informations and indictments to state the acts constituting the offense in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended, an information giving the date and place of the alleged offense, and stating that accused "did then and there unlawfully and feloniously assault one L with a dangerous weapon, with intent to kill" him, sufficiently states the facts, and does not state merely a conclusion of law.

ASSAULT WITH INTENT TO KILL—ALLEGATION OF INTENT.

3. In an information charging an assault with intent to kill it is not necessary in Oregon to allege that the act was purposely and maliciously done, or that it was done with premeditation or with malice aforethought, whatever the rule may be elsewhere: *State v. Lynch*, 20 Or. 389, followed.

HARMLESS ERROR.

4. Where a party was convicted of an assault with a dangerous weapon, a charge that he might be convicted of a simple assault was nonprejudicial, if erroneous.

VERDICT OF LESSER OFFENSE THAN THAT CHARGED.

5. Where defendant, in a prosecution upon an information charging assault with a dangerous weapon with intent to kill, admitted the assault, and sought to justify his act on the ground of self-defense, the jury are not restricted to a verdict of guilty as charged or not guilty, but may find defendant guilty of an assault with a dangerous weapon, without intent to kill.

From Marion: **GEORGE H. BURNETT**, Judge.

John Kelly has appealed from a conviction of an assault with a dangerous weapon. **AFFIRMED.**

For appellant there was a brief over the names of *M. E. Pogue*, *J. A. Jeffrey*, and *R. J. Fleming*, with an oral argument by *Mr. Pogue*, and *Mr. Jeffrey*.

For the state there was a brief over the names of *Julius Newton Hart*, District Attorney, and *John H. McNary*, with an oral argument by *Mr. McNary*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a criminal prosecution on an information of the district attorney. The defendant was charged with the crime of assault with intent to kill, and convicted of an assault with a dangerous weapon. The charging part of the information is as follows: "The said John Kelly on the 15th day of June, 1901, in the County of Marion and the State of Oregon, then and there being armed with a dangerous weapon, to wit, a pistol loaded with powder and ball, did then and there unlawfully and feloniously assault one Frank Lambert with said dangerous weapon, with intent him, the said Frank Lambert, to kill with said dangerous weapon, by then and there unlawfully and feloniously shooting and wounding the said Frank Lambert, contrary to the statutes," etc. After the verdict the defendant moved for a judgment of acquittal, and it is now contended (1) that the information is insufficient to charge the crime of an assault with intent to kill; and (2) that, the shooting having been admitted by the defendant, and he having sought to justify the act on the ground of self-defense, but one of two verdicts could have been found, namely, guilty as charged or not guilty. Touching the insufficiency of the information it is urged (a) that the venue is not sufficiently laid, for that the words "then and there being armed," etc., refer to the date of the information, and not to the time the act is alleged to have been committed; (b) that the acts constituting the alleged assault are not sufficiently stated, being, as stated, a mere conclusion of law, and because the words "shooting and wounding the said Frank Lambert" qualify and attend the words "to kill," rather than the allegation of assault; and

(c) that it is not alleged that the assault was purposely and maliciously done. Of these in their order.

1. It is usual, and perhaps requisite, that the time and place should qualify or be added to every alleged fact in an information or indictment for felony: *Nicholson v. State*, 18 Ala. 529 (54 Am. Dec. 168); *State v. Thurstin*, 35 Me. 205 (58 Am. Dec. 695). The information herein comes up to the full measure of the law. "Then and there being armed with a dangerous weapon" refers indisputably to "the 15th day of June, 1901." This is evidently the date upon which it is alleged the crime was committed, as it is subsequently averred that he "did then and there unlawfully and feloniously assault," referring back to the same language, fixing the day as its antecedent; so that the specific objection is not well taken.

2. The second criticism is also without efficacy. The manner of the assault is alleged as being "with said dangerous weapon, with intent to kill," etc., "by then and there unlawfully shooting and wounding said Frank Lambert." The statute requires a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended: Hill's Ann. Laws, subd. 2, § 1268. Measured by this standard, the indictment is not open to this criticism: *People v. Ah Woo*, 28 Cal. 205.

3. The next objection is fully met by former decisions of this court: *State v. Doty*, 5 Or. 491; *State v. Lynch*, 20 Or. 389 (26 Pac. 219). By these the court is committed to the doctrine that it is unnecessary, in an indictment for a like offense to that charged herein, to allege that the act was purposely and maliciously done, or with premeditation or malice aforethought. In the latter case the majority of the court felt bound solely upon the ground of *stare decisis*, referring to the former; at the same time suggesting that it was not supported by the better authority. We are bound upon the same principle, if by none other, and do not feel warranted in disturbing the precedent.

4. This brings us to the second contention. It has been de-

terminated that a person charged under Section 1740, Hill's Ann. Laws, with an assault with an intent to kill, may be convicted under section 1744 of an assault, being armed with a dangerous weapon: *State v. McLennen*, 16 Or. 59 (16 Pac. 879). In the case at bar, however, the defendant admitted the assault, and sought to justify his act upon the ground of self-defense. He testified in his own behalf that, while he and Lambert were sitting on the steps of a store, Lambert commenced quarreling with him, and thereupon assaulted him viciously, by catching him by the shoulder with one hand and striking him in the face with the other, knocking him off the steps; that he immediately arose and started to his buggy, and, in order to avoid passing in front of or near Lambert, passed out into the street, and around a tree standing at the edge of the sidewalk, at the same time asking Lambert why he struck him; that Lambert answered, "I'll kick the lungs out of you," coupling it with an epithet, whereupon he drew his pistol and pointed it at Lambert, saying, "If you hit me again, I will shoot you;" that Lambert said, "Shoot," accompanying it with violent language, at the same time rushing at him with his left hand extended, and his right hand in his hip pocket. Another witness testified that the shot was fired when Lambert was advancing rapidly towards the defendant, the ball taking effect in Lambert's face. The court instructed the jury that they could find one of four verdicts: Assault as charged in the indictment, assault with a dangerous weapon, an assault only, or not guilty. It is maintained that the court erred in this instruction, and that the verdict should be either guilty as charged or not guilty, and that, having found the defendant guilty of an assault with a dangerous weapon,—a lesser offense of the same grade,—it was tantamount to an acquittal of the higher offense, and therefore that he should be discharged. We will not attempt to determine whether there was error in charging that the jury might find for an assault only, for, if there was, it was favorable to the defendant, he being convicted of a graver crime, and a reversal of the judgment could not be predicated thereon.

5. The elements entering into the two crimes of assault with intent to kill, and an assault, being armed with a dangerous weapon, are aptly analyzed in *State v. McLennen*, 16 Or. 59 (16 Pac. 879). In the first there must be an assault coupled with an intent to kill; and in the latter the defendant must be armed with a dangerous weapon, and the assault made therewith. Now, an assault is an intentional attempt to do injury to another: 2 Wharton, Cr. Law (7 ed.), § 1241. So that an assault with a dangerous weapon is an intentional attempt to do injury to another with such weapon, and the element of intent attends the offense. We have therefore in the one case an intent to kill, and in the other an intent to do injury with the weapon used, and it was pertinent for the jury to determine with what intent the assault was made, it being admitted that it was made with a dangerous weapon; and it therefore follows that the court properly instructed them that they might find the defendant guilty of an assault with a dangerous weapon. The cases cited and relied upon by defendant do not seem to support his position as applied to a case like this. The most pertinent are *State v. Doyle*, 107 Mo. 36 (17 S. W. 751); *State v. Maguire*, 113 Mo. 670 (21 S. W. 212); and *Phillips v. State* (Tex. Cr. App.), 36 S. W. 86. As illustrating the principle upon which these cases turn, it was said in the first cited: "If the unquestioned evidence showed that the offense charged, and no other, was committed, then a conviction could only properly be had for the one charged. The admissions of defendant show that he was guilty of a felonious assault, unless justified. Under the testimony given by defendant himself, the court properly refused to instruct on an offense less than charged." Not so in the case at bar, as the evidence is susceptible of two interpretations,—an assault with intent to kill, or an assault with a dangerous weapon, being armed therewith, with intent to injure the defendant. The intent was not necessarily to kill because a pistol was used, and the jury found otherwise. The judgment should therefore be affirmed, and it is so ordered.

AFFIRMED.

Decided 24 February; rehearing denied 7 April, 1902.

WILLARD v. BULLEN.

[67 Pac. 924, 68 Pac. 422.]

RIGHTS OF A SILENT PARTNER—PRIORITY OF CREDITORS.

1. A dormant partner will not be permitted to claim any part of the partnership property until creditors who did not know of his interest have been paid; as, for example, one who had a secret agreement with a company, by which he was to be a partner with it so far as the substructure of a certain bridge was concerned, but who acted ostensibly as an employe and agent of the company in superintending such substructure and in ordering materials and making contracts for it, the construction contract being an entire one, and in the name of the company, is estopped, as against the creditors of the company, from denying that it alone was interested in the contract; and his secret contract of partnership in the substructure work did not vest him with any title as against such creditors in the money due for the construction of the bridge.

LACHES—DISCRETION OF COURT.

2. The question whether one claiming payment out of a fund in litigation was guilty of laches in intervening to protect his claim, being within the judicial discretion of the trial court, its allowance of the claim will not be disturbed by the appellate court.

EQUITABLE ASSIGNMENT OF DEBT—EFFECT OF ORDER.*

3. An order upon a specified fund operates as an equitable assignment of a part of the fund, entitling the payee thereof to payment in full out of the fund to the exclusion of the general creditors of the drawer of the order, after its presentation to the holder of the fund: *McDaniel v. Maxwell*, 21 Or. 202, applied.

From Multnomah: JOHN B. CLELAND, Judge.

This is a controversy over the distribution of a balance due from the City of Portland to the Bullen Bridge Co. on the contract for the construction of Burnside Street Bridge. In September, 1892, the committee charged with the duty of constructing bridges across the Willamette River at Portland invited proposals for furnishing necessary material and labor for the erection of a bridge at Burnside Street in accordance with certain general plans and specifications theretofore adopted by the committee. Proposals were requested for the substructure, superstructure, and the entire work separately. In response thereto, C. A. & A. G. Bullen, partners doing business

*See, on this point, *Wadhams v. Inman*, 38 Or. 143.—REPORTER.

under the firm name of the Bullen Bridge Co., submitted a satisfactory proposal, and after due consideration the contract for the entire structure was awarded to them for the sum of \$262,287.20. The plaintiff, an engineer experienced in substructure work, assisted the Bullens in making estimates and securing data for their bid, with the understanding that in case of its acceptance they and plaintiff should, as partners, do the substructure or foundation work, and share equally in the profits thereof. The plaintiff, however, was in no way known or represented in the contract, the arrangement between himself and the Bullens being private. The construction of the substructure and superstructure of the bridge proceeded simultaneously under the contract for the entire work in the name of the Bullen Bridge Co., and with it ostensibly as the sole contractor, the plaintiff having charge of the substructure work apparently as superintendent or engineer for the Bullens. The books of account were kept by the latter, all materials and supplies purchased and all labor employed in their name and on their account. All payments on the contract were received and disbursed by them, and, so far as the public was concerned they were the only parties interested in the matter. No material was purchased with an understanding that it was to be put into any particular part of the bridge, or on account of any one other than the Bullen Bridge Co. The bridge was completed in July, 1894, at which time there remained unpaid on the contract price the sum of \$24,284.02, and the Bullens were indebted to divers and sundry persons, firms, and corporations for material and labor furnished and used in and about the construction of the bridge.

Prior to its completion, and on April 23, 1894, they borrowed of the Commercial National Bank \$3,000 to use in paying for labor and material, giving as collateral security therefor an order on the Bridge Committee for \$5,000, payable out of "the final estimate;" and at the time the bridge was completed they were indebted to the bank for money furnished for like purposes, which, with the sum previously borrowed, amounted to \$10,000, for which they gave it an additional order on the

Bridge Committee for \$5,000, payable on "making final settlement." On the same day the bridge company gave orders to the North Pacific Lumber Co. and Kelly, Dunne & Co., for \$7,500, and \$677.48, respectively, payable out of the "next estimate or payment due under the terms of the contract" for materials furnished and used in the construction of the bridge, and an order to William Jacobson August 2, 1894, for \$3,359.38, for labor and material furnished by him and used in the substructure. These orders were presented to and filed with the Bridge Committee about the time they bear date; but before any of them were paid, or the final settlement had, the plaintiff brought this suit against the Bullen Bridge Co., the Bridge Committee, and the persons in whose favor orders had been given, to enjoin the payment of any money to the Bullens or on such orders until the rights of the plaintiff as a partner in the substructure work had been adjusted and determined, asserting and alleging that of the money then unpaid \$16,416.66 was due for substructure work, and that he was entitled to one half thereof, after the payment of certain debts contracted on account of such work, before the Bullens or the order claimants should be paid. Upon an *ex parte* application an injunction was issued, but subsequently, with the consent of the plaintiff as to the claims of Jacobson, the North Pacific Lumber Co., and Kelly, Dunne & Co., the Bridge Committee was authorized to and did pay the orders held by these several parties. Thereafter Honeyman, De Hart & Co., and the American Bridge Works were permitted to intervene, whereupon the former set up a claim of \$1,092.71 for material furnished and used in and about the construction of the bridge, and the latter for a balance of \$7,878.21 for iron, steel, and other bridge material sold and delivered to the Bullen Bridge Co. under a contract made with it before any work was done on the bridge. The order claimants appeared, and by answer set up their respective rights, and, issue having been joined between the parties, the cause was referred, with directions to the referee to report the law and the facts, pending which the American Bridge & Contract Co. was made a defendant, and answered,

setting up the fact that since the commencement of the suit it had recovered a judgment against the Bullens and the plaintiff, as partners, for the sum of \$647.65. After the referee's report was filed, and on the 30th of November, 1897, an order was made authorizing and directing the Bridge Commission to pay out of the funds then in its hands to the Commercial National Bank \$6,090.61, the American Bridge Works \$4,798.31, the American Bridge & Contract Co. \$394.45, Honeyman, De Hart & Co. \$655.50, and to the plaintiff \$1,287.67, upon each filing a sufficient bond, conditioned that they will return to the clerk, upon the order of the court, the several sums by them respectively received, or so much thereof as may be ordered upon the final hearing, in case any of them shall be, by the circuit or appellate court, found entitled to a less sum.

Thereafter, and on the 27th of January, 1899, Edwin Thatcher intervened, with permission of the court, over the objections of the other defendants, and set up a claim for \$3,481.42 for services in making plans and preliminary estimates, assisting the Bullen Bridge Co. in getting the contract, and as consulting engineer during the building of the bridge. Issue having been joined thereon and a hearing had on the motions to confirm the report of the referee and exceptions thereto, after consideration of the matter the trial court made and entered its findings and decree to the effect that the balance due the Bullen Bridge Co. should be distributed and applied: (1) To the payment of the costs and disbursements of the suit; (2) to the payment of such sums as the parties had stipulated should be disbursed from the fund during the progress of the suit; (3) to the orders drawn by the Bullen Bridge Co. upon the Bridge Commission in favor of the Commercial National Bank, \$10,000, North Pacific Lumber Co., \$7,500, Kelly, Dunne & Co., \$677.48, and Jacobson, \$2,870; (4) to the payment of \$2,114.12, found by the court to be due the plaintiff as a partner with the Bullens in the substructure work, the same to be disbursed, however, first to the payment of \$——— to plaintiff's counsel, and the remainder to be distributed *pro rata* between Thatcher and the American Bridge

& Contract Co.; and (5) the remainder of the fund, if any, to be applied *pro rata* to the payment of the claims of the other creditors of the Bullen Bridge Co. From this decree practically all the parties except Jacobson have appealed.

MODIFIED.

For Willard there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wm. C. Bristol*.

For Commercial National Bank there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison Gray Platt*.

For Thatcher there was a brief over the names of *Wm. M. Gregory* and *Arthur C. Emmons*, with an oral argument by *Mr. Gregory*.

For American Bridge & Contract Co. there was a brief over the name of *Mitchell & Tanner*, with an oral argument by *Mr. Albert H. Tanner*.

For North Pacific Lumber Co., American Bridge Works, and Honeyman, De Hart & Co., there was a brief and an oral argument by *Mr. Thos. N. Strong*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The record herein is somewhat complicated, and many questions have been discussed by counsel. In our opinion, however, the case can be determined by the application of a few well-settled principles of law. As we understand, the primary object of the suit is not to dissolve the partnership and take an accounting between plaintiff and the Bullen Bridge Co., for the purpose of ascertaining the amount, if any, due plaintiff from the Bullens. It does not seem to have been so regarded in the court below, and the Bullens have not appeared in this court, so that we shall not attempt at this time to state an account between them. Nor is it sought to charge the plaintiff,

as a partner, for debts contracted by the Bullen Bridge Co. The real purpose is to ascertain and determine the rights of the several parties to the record to the balance remaining due the bridge company on its original contract with the City of Portland. Although the Bullens, in their answer, admit that the plaintiff was a partner with them in the substructure work, and was to bear half the expense and share equally in the profits thereof, it is doubtful whether, under the facts disclosed by the record, he can, as against the creditors, be regarded as a partner, or in any other or different light than an employe, who was to be compensated in part by a share in the profits of that portion of the Bullen contract: *Voorhees v. Jones*, 29 N. J. Law, 270.

1. But, however that may be, he must, we think, be regarded as a dormant partner, if a partner at all, under an agreement by which he was to enjoy a portion of the profits, if any, upon the substructure work, while his interest was practically concealed from parties dealing with the bridge company. The contract for the construction of the bridge was entire, and all the business in relation thereto was conducted in the name of and by the Bullen Bridge Co., with which firm alone the parties to this litigation dealt, relying upon its personal credit and the contract with the city. It is true, some of them were advised that the plaintiff had some interest in the substructure, but they did not know that the work was being done by him and the Bullens as partners separately from the other parts of the bridge; on the contrary, his conduct was such as to induce them to believe otherwise. He was in charge of the substructure work, apparently as the agent and superintendent of the Bullen Bridge Co., ordered material and made contracts from time to time for and on its behalf and as its agent. Indeed, much of the material purchased from the parties to this litigation was so ordered. Having thus allowed the Bullen Bridge Co. to be held out to the world as the sole party interested in the contract, and having thus permitted it to purchase material and obtain credit on the faith thereof, he cannot now be allowed to say that the property of the company and the

proceeds of the contract are not liable for the debts thus contracted. Under such circumstances it would be as repugnant to the principles of law as it is to the dictates of natural justice for him to be allowed to come in now and assert a claim to any part of the money arising under the contract superior to that of the material and labor claimants and others who relied upon the apparent interest and ownership of the Bullen Bridge Co. By remaining silent, and allowing the company to conduct the business as one entire contract, and to obtain credit on account thereof, he is estopped from denying that the bridge company was alone interested in the contract when the rights of third persons intervene. By his conduct he, in effect, disclaimed to those dealing with the bridge company that he had any interest in the contract which was superior or would take precedence over the debts contracted in its performance, and he is now bound by such representations.

"A partner cannot keep his membership secret," says Mr. Bates, "and afterwards be allowed to appear and embarrass creditors or persons who have acquired claims on the faith of the sole ownership of the ostensible partner": 1 Bates, Partn. § 155. And Mr. Justice CATON, in referring to this same question, says: "The law and the courts discountenance these secret trusts and partnerships as opening a wide door to the greatest frauds. Most effectually to prevent this, whenever the rights of third persons intervene, neither of the parties are permitted to assert the partnership, but the whole is considered as an individual transaction, and the property as belonging to the ostensible partner, unless the creditors choose to treat the dormant partner as interested. Indeed, I may say there is no partnership, only as between the parties themselves": *Talcott v. Dudley*, 4 Seam. 427, 438. And in *Lord v. Baldwin*, 6 Pick. 348, it is held that the attachment of a stock of goods in the hands of the ostensible partner in a suit against him alone has preference over a subsequent attachment of the same goods by another person in an action against the ostensible and the dormant partner, Mr. Chief Justice PARKER saying: "Even if he (the dormant partner) owned the whole of the stock, as

between him and the known man of business still it is in law the property of the latter, for he is allowed to claim and use it as his alone, and thus lead persons to trust him upon the faith of the goods in his possession. * * The property then is not the dormant partner's, to the prejudice of those who trust him who carries on the business and obtains the credit." And in *Cammack v. Johnson*, 2 N. J. Eq. 163, the suit was brought by the dormant partner against the person in whose name the business was conducted for an accounting and dissolution of the partnership and to enjoin certain individual judgment creditors from enforcing their claims against the partnership property in preference to partnership debts, and the court, after referring to and approving *Lord v. Baldwin*, 6 Pick. 348, and *French v. Chase*, 6 Greenl. 166, say: "The cases cited arose on disputes between creditors; but in the case before me the complainant, who asks the aid of the court, is himself the dormant partner; and surely, if creditors cannot claim the appropriation of partnership effects for payment of their demands first, there is less reason for doing so at the instance of the silent and unknown partner. The step is voluntary with him. He chose to place himself in this position, and it is far more just that he should suffer by it (however much that is to be regretted) than innocent traders who have been kept in the dark as to the true condition of things by his act. Upon the creditors of the firm there is no other hardship than that which occurs continually when one creditor is preferred by his debtor over another. The law authorizes this preference, if obtained by way of judgment, and it is practiced every day. Had there been no partnership, they must have been postponed in their demands by those judgments and executions; and there is no good reason why the discovery of a partner at this late day should, in justice and equity, change the rights or remedies of any of the creditors." In *Allen v. Brown*, 39 Iowa, 330, it was held that if, after making an overdraft at a bank, the drawer takes a secret partner, who supplies money with which subsequent deposits are made, they may be applied by the bank to the prior overdrafts, on the ground that, so far as it was con-

cerned, the deposits were properly regarded as money of the ostensible partner. See, also, to the same effect, 17 Am. & Eng. Ency. Law (1 ed.), 931; *How v. Kane*, 2 Pin. 531 (54 Am. Dec. 152); *Brown's Appeal*, 17 Pa. 480; *Callender v. Robinson*, 96 Pa. 454; *Van Valen v. Russell*, 13 Barb. 590. Within the doctrine of these authorities, the contract between the plaintiff and the Bullens that he should be a partner in the substructure work did not vest him with any title or ownership as against creditors of the bridge company in the money due from the city for the construction of the bridge, or any part thereof. That partnership was an affair between himself and the Bullens, by which the creditors of the latter cannot be prejudiced. The money due upon the contract for the construction of the bridge is the assets of the Bullen Bridge Co., to which the plaintiff has no claim until all the debts incurred by it on account thereof have been paid.

2. The remaining question is one of priority between the several creditor claimants. Objection to the intervention of Thatcher was made on the ground of *laches*; but that was a matter within the judicial discretion of the trial court, and we do not think its conclusion ought to be disturbed.

3. The orders in favor of the Commercial National Bank, the North Pacific Lumber Co., Kelly, Dunne & Co., and Jacobson operated as an equitable assignment of a part of the fund (*McDaniel v. Maxwell*, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740; *Erickson v. Inman*, 34 Or. 44, 54 Pac. 949), and gave to these order claimants a prior right to be paid out of such fund before the general creditors. As there is sufficient money to pay all of these orders in full, it is unnecessary to consider the question of priority as between the holders thereof.

The other parties to the suit, standing in the position of general contract creditors of the Bullen Bridge Co. with equal equities, are entitled to share *pro rata* in any surplus that may remain after the order claimants have been paid. Under the order of distribution made by the trial court on December 10, 1897, the Commercial National Bank did not receive the

full amount to which it was entitled, and the general creditors received the excess. According to the terms of such order, they will be required to return to the clerk of the court below a sufficient amount of the money paid to them to make up the balance due the bank; and, as they have had the benefit of the money, and the bank has been denied the use thereof, it is equitable and just that they should pay interest thereon.

A decree will be entered here in accordance with the views expressed in this opinion. MODIFIED.

Decided 7 April, 1902.

ON MOTIONS FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

After a careful re-examination of the case, the court adheres to the views expressed in its decision heretofore given, as to the proper distribution of the fund in the hands of the Bridge Committee at the time the suit was commenced, the reasons for which are given in the opinion already filed, and need not be restated. The pleadings admit, however, that, as between themselves, the plaintiff and the Bullens were partners in the substructure work, and entitled to share equally in the profits thereof. The plaintiff, therefore, asks that such partnership be dissolved, and that he have a decree against the Bullens for his share of the profits. The entire sum paid and agreed to be paid by the city for the substructure work, according to the finding of the trial court and the evidence, was \$128,969.52. The actual cost thereof to the plaintiff and the Bullens is difficult to ascertain. No settlement or accounting was ever had between them, and no partnership books were kept. The only books of account were those of the bridge company, containing all their business transactions. No separate account was kept of the substructure work, although an account of the expense of constructing the different portions of the bridge is shown by the books. It is therefore difficult to determine, with any reasonable degree of accuracy, the actual cost of the substructure; but from the testimony of the parties,

in connection with the books, we are of the opinion that the result arrived at by the court below, with the exception of the item of \$500 for securing the contract, and the judgment of \$647.65 in favor of the American Contract Co., is substantially correct. The charge of \$500 as expenses incurred by the Bullens in securing the contract ought not to be allowed, because the items of such expenditure are not given, and the Bullens refused to make any satisfactory explanation thereof. The judgment in favor of the American Contract Co. has never been paid, and is still an outstanding obligation against plaintiff and the Bullens, and ought not to be charged in this accounting as a part of the cost of construction. Eliminating the two items referred to, the profit on the substructure would be \$12,590.17. As the plaintiff drew from the firm during the progress of the work \$3,607 more than he paid in, the balance due him would therefore be \$2,688.08. This amount he is entitled to recover from the Bullens. The several petitions for rehearing are denied.

REHEARING DENIED.

Argued 28 April; decided 3 May, 1902.

STATE v. WELCH.

[68 Pac. 808.]

RAPE—DEDUCTION FROM CIRCUMSTANTIAL EVIDENCE.

In a prosecution for rape by carnally knowing a female under the age of consent (Hill's Ann. Laws, § 1733; Laws, 1895, p. 67), where the evidence showed that the defendant for weeks occupied with the female in question, she being a prostitute, a room with only one bed, the jury might reasonably infer that there was a sufficient penetration to consummate the crime charged.

From Douglas: REUBEN P. BOISE, Judge.

L. L. Welch was convicted of carnally knowing a female under sixteen years of age, and appeals.

AFFIRMED.

For appellant there was a brief over the names of *John A. Carson* and *J. A. Buchanan*, with an oral argument by *Mr. Carson*.

For the state there was a brief over the names of *D. R. N. Blackburn*, Attorney-General, *George M. Brown*, District Attorney, and *L. T. Harris*, with an oral argument by *Mr. Harris*.

MR. JUSTICE MOORE delivered the opinion.

The defendant was convicted of carnally knowing Effie McCulloch, a female under the age of sixteen years, and, having been sentenced to imprisonment in the penitentiary, he appeals, assigning as error, *inter alia*, the action of the court in refusing to instruct the jury to return a verdict of not guilty, on the ground that no testimony had been offered tending to prove penetration. Testimony was introduced at the trial from which the jury might reasonably have found that Effie McCulloch, at the time of the alleged commission of the offense, was only fifteen and a half years old, though several witnesses testified that in their opinion she was about three years older. She had been an inmate of houses of ill fame for about two years prior thereto, and was the mother of two illegitimate children, the eldest being then about three years old. The defendant, having met her at Riddles, Oregon, went to Roseburg, and engaged a room having but one bed, saying to the landlady of the lodging house that his wife would be there with him a few days. That evening Effie McCulloch went with him to this room, which they kept five weeks, both occupying the same bed, and while living at this house she frequently introduced him to others as her husband, which statement he never denied. His wife learning these facts, caused him to be arrested for adultery, and at the preliminary examination he was held to answer the charge, and was committed to jail in default of bail. Effie McCulloch tried to procure sureties upon the bond for his appearance; but, having failed to secure his release, she committed suicide, and after her death the information was filed upon which he was convicted.

It is contended by his counsel that the testimony, hereinbefore detailed, may have disclosed an opportunity to commit the crime with which he was charged, but it was insufficient to prove the *corpus delicti*, and that the court erred in the par-

ticular indicated. The statute, for the violation of which the conviction was secured, so far as material, is as follows: "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, * * such person shall be deemed guilty of rape, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary," etc: Hill's Ann. Laws, § 1733, as amended by Laws, 1895, p. 67. The only question argued was whether the jury could legally infer carnal knowledge from testimony which conclusively showed that the defendant, for five weeks, occupied the same bed with a prostitute. If, in a prosecution for carnally knowing a female whose immature mind was deemed by legislative enactment incapable of consenting to her own degradation, it were necessary to prove coition by producing witnesses to the overt act, it must be admitted that the statute designed to eradicate the evil would prove wholly ineffectual for that purpose. Offenses of this character are always committed in secret; and, if their perpetration cannot be properly inferred from circumstances that irresistibly lead to such conclusion, failure of justice must inevitably result in nearly every instance. Circumstantial evidence is often of more weight in reaching correct conclusions upon issues of fact than the testimony of witnesses, who may have been suborned, or whose statements may be distorted by prejudice, colored by passion, or rendered false by failing memory. Circumstances not designed by interested parties to attract attention frequently furnish irrefutable evidence of material facts, and are adequate in character and sufficient in weight for a jury, under proper instructions from the court, to reach correct conclusions upon issues involving life, liberty, and property.

Although the rule is general that in prosecutions for rape penetration should be proved beyond a reasonable doubt (*Davis v. State*, 43 Tex. 189), it has been held, on the trial for unlawfully knowing and abusing a female child, that the fact of penetration may be found by the jury from circumstances alone: *Brauer v. State*, 25 Wis. 413. The wisdom and justice of this conclusion is apparent; for a contrary rule might, in

some cases, lead to the acquittal of a lecherous brute in human form because he selected for the gratification of his evil passion a child too young to understand the nature of an oath, and therefore incompetent to testify concerning the assault made upon her. Evidence of mere opportunity for sexual indulgence, in the absence of proof of a lascivious inclination on the part of both parties, is not sufficient circumstance to warrant an inference of the commission of such offense: Bishop, Stat. Cr. § 679; *State v. Scott*, 28 Or. 331 (42 Pac. 1). Any other conclusion might result in ruining the reputation of a chaste woman, who, otherwise unattended, accompanied a continent man to any place where she was not at all times the object of public gaze. Except for the purpose of accomplishing some laudable object, it is not to be supposed that a man and a woman who are not married to each other can knowingly visit houses of ill repute and maintain unimpeachable reputations for morality; nor can they, in any instance, except possibly in cases of extreme peril of perishing, jointly enjoy the same bed without creating the inference that the occupancy of the couch is for an immoral purpose. Thus in *Blackman v. State*, 36 Ala. 295, the plaintiff in error, a married man, being tried upon an indictment charging him with committing adultery, the state having proved that he frequently visited the house of a woman whose general reputation for chastity was bad, and that he was seen at night in her bedroom lying with her on the same bed, it was held that such circumstances afforded sufficient evidence to justify a conviction, the court saying: "That a married man frequently visits, at night, the house of a female, and is seen with her in her bedroom, and lying with her on the same bed at night, are circumstances which, of themselves, are well calculated 'to lead the guarded discretion of a reasonable and just man to the conclusion' that the parties have been guilty of adultery. The presumption that the criminal act had been committed would be strengthened by proof that the general reputation of the female was that of a woman who was not disinclined to yield to the temptations and improve the opportunities established by such evi-

dence." In *Commonwealth v. Mosier*, 135 Pa. 221 (19 Atl. 943), it is held not to be error to instruct the jury, upon the trial of an indictment for adultery, that the law would fully warrant the inference of the commission of the crime charged from the fact that a man and a woman, not husband and wife, were occupying the same room, undressed and at night. In *Richardson v. State*, 34 Tex. 142, a married man and a colored woman, not his wife, having lived together for several months in the same room, wherein there was but one bed, and with no other attendant than a small child, it is held to be strong evidence of adultery, and sufficient to warrant a verdict of conviction.

The testimony having disclosed that the defendant and Effie McCulloch jointly occupied the same room for five weeks, the inference of his carnal knowledge of her was reasonably deducible from such circumstances, particularly so in view of her unsavory reputation. No error was committed in refusing to charge the jury as requested, and hence the judgment is affirmed.

AFFIRMED.

Argued 3 February; decided 24 February, 1902; rehearing denied.

CHAPERON v. PORTLAND ELECTRIC CO.

[67 Pac. 928.]

PLEADING—ALLEGATION OF NEGLIGENCE.

1. A complaint in an action for injuries sustained by reason of defendant's negligence is sufficient when it specifies the particular act which caused the injury, together with a general allegation that such act was negligently done; for the word "negligence," when applied to such an act, is a statement of an ultimate fact, and renders the act actionable: *Cederson v. Oregon Nav. Co.* 38 Or. 343, and *Boyd v. Portland Elec. Co.* 40 Or. 126, followed.

ELECTRICITY—NEGLIGENT MAINTENANCE OF BROKEN WIRE.

2. A complaint in an action for injury to a horse and vehicle through a broken wire, charged with electricity, suspended over a street, which alleges that defendant negligently permitted such wire to become and remain broken on the street, is not bad for failing to allege that the wire also struck the horse by reason of defendant's negligence.

TRIAL—NONSUIT—SUFFICIENCY OF EVIDENCE.

3. In an action for injuries to a horse and vehicle caused by a broken wire, charged with electricity, suspended over a street, it appeared that the horse attached to the vehicle, after entering a certain street, suddenly fell. The

41	39
41	344
41	39
48	600
41	39
48	442

driver sprang to the ground, and saw a live wire close to the wagon wheel. He did not see the horse come in contact with the wire. The horse, while struggling to his feet, touched the wire, when he again fell, "as if shot." A witness saw sparks thrown from the wire, and, approaching near to it, received a shock from the ground. It was shown that the wire had remained broken for an hour before the accident. *Held*, that the jury was justified in finding that the injury was caused by an electric shock from the wire, and hence it was proper to refuse a motion for nonsuit.

NEGLIGENCE—ELECTRIC WIRES—RES IPSA LOQUITUR.*

4. The fact that injury has resulted from a broken and fallen live electric wire is enough, under the doctrine of *res ipsa loquitur*, to raise a disputable presumption of negligence on the part of the owner of the wire, relieving plaintiff from showing further facts, and excluding the presumption that it was not due to defendant's negligence: *Boyd v. Portland Elec. Co.* 40 Or. 126, followed.

NEGLIGENCE—WEIGHT OF EVIDENCE.

5. Where there is any evidence reasonably tending to support the allegations of a complaint, the case should go to the jury, as they are the judges of the value and weight of testimony: as, for example, where, in an action for injuries caused by a broken electric wire, defendant produced evidence tending to show that the wire was broken during the night of the accident by reason of a storm, that the wires and the poles on which they were fastened were inspected once every day, that the best approved appliances for discovering breaks in the wires were used, and that on the night in question such tests were applied every half hour, and that the detector failed to indicate the parting of the wire, it was for the jury to determine whether this evidence excused defendant.

COMPETENCY OF OPINION EVIDENCE.

6. One who purchased property for a special purpose and has used it for that purpose during a considerable time,—say five years,—is competent to estimate the value of such property.

DAMAGES—EVIDENCE INDIRECTLY SHOWING VALUE.

7. In an action for injury to a horse, it was not error to permit plaintiff to prove that since the accident he had hired horses to take the place of the one injured, and that he had paid a certain amount for such hiring, for the testimony tended to establish value.

SHOWING MATTERS OF COMMON KNOWLEDGE—HARMLESS ERROR.

8. In an action for injuries to a horse and vehicle, it was not error to permit proof of the amount of the repairs to the vehicle and harness, without showing that the amount was reasonable, where such amount was small, and concerned matters of common knowledge.

NEGLIGENCE—TIME ALLOWED TO REPAIR.

9. In an action for injuries sustained by reason of a broken wire charged with electricity, an instruction that defendant was entitled to a reasonable time after the fall of the wire to repair it, and would not be liable for an injury occurring before such time, was properly refused, because it was misleading, in not being limited to a case where the wire had broken without defendant's negligence.

*NOTE.—See *Chattanooga Elec. Ry. Co. v. Mingle*, 7 Am. Electl. Cas. 594, *Jones v. Union Ry. Co.* 7 Am. Electl. Cas. 447; *Trenton Pass. Ry. Co. v. Cooper*, 7 Am. Electl. Cas. 444. and note, 38 L. R. A. 637, 64 Am. St. Rep. 592.—REPORTER.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This action was begun by Phillip Chaperon against the Portland General Electric Co. in a justice's court, and taken to the circuit court on appeal. The defendant is, and was at the time of the accident complained of, engaged in maintaining and conducting upon College and other public streets in the City of Portland a system of poles, and wires extended thereon, for the transmission of electricity; and for cause of action it is alleged "that on the 1st of December, 1899, at about the hour of 3 o'clock A. M. of said day, the plaintiff was, by and through his employe, engaged in driving his horse and bakery wagon upon said College Street, * * and that, without notice of or fault upon the part of plaintiff or his employe, the defendant corporation carelessly, unlawfully, and negligently allowed one of its wires, charged heavily with electricity, to become broken and hang down upon said College Street, and that plaintiff, nor his employe, did not know that said wire was broken, or was hanging down upon said street; and that while said wire of defendant, charged with electricity, was so hanging upon and close to said College Street, the horse and wagon belonging to plaintiff was being driven upon and along said street, and, without fault on the part of plaintiff or his employe, said broken and hanging wire, heavily charged with electricity, came into contact with and struck the horse belonging to plaintiff, and threw said horse to the ground, seriously and permanently injuring said horse, and breaking the shaft of the bakery wagon, and tearing the harness upon the horse, to the damage of the plaintiff in the sum of \$150," etc., which is followed by allegations of special damages. The sufficiency of the complaint was challenged during the trial by objections to the introduction of evidence, a motion for nonsuit, and by a request for an instruction to find in favor of the defendant.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Frederick V. Holman*.

For respondent there was a brief over the name of *Bernstein & Cohen*, with an oral argument by *Mr. D. Solis Cohen*.

MR. JUSTICE WOLVERTON, after stating the facts as above, delivered the opinion of the court.

1. We have recently held, after a careful review of the authorities, that it is sufficient, in a declaration upon negligence, to specify the particular act, the commission or omission of which caused the injury, conjoining with it a general averment that it was negligently and carelessly done, or omitted, and that it is unnecessary to go further, and particularize or point out the specific facts going to establish the negligence relied upon: *Cederson v. Oregon Nav. Co.* 38 Or. 343 (62 Pac. 637, 63 Pac. 763, 21 Am. & Eng. R. Cas. 624). The proposition has been still more recently sanctioned in *Boyd v. Portland Elec. Co.* 40 Or. 126 (66 Pac. 576, 8 Am. Electl. Cas. —). To the same purpose see *Snyder v. Wheeling Elec. Co.* 43 W. Va. 661 (7 Am. Electl. Cas. 473, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922). This results from the significance of the term "negligence," as applied to an act conducing to injury. It so qualifies the act as to render it actionable, and the allegation is treated as a statement of an ultimate fact, rather than a mere conclusion of law.

2. But it is insisted that there is no pertinent allegation that the damage ensued from the negligence of the defendant, or, in other words (employing the language of the counsel), "it is not alleged that the wire coming in contact with and striking the horse was in any way due to appellant's negligence." The act of which plaintiff complained consisted in carelessly and negligently allowing and permitting a wire heavily charged with electricity to become broken and hang down upon a street where plaintiff's horse was being driven, and, without fault of the driver, was brought in contact therewith, whereby injury ensued. Now, to fill the measure of the contention, it was incumbent upon the plaintiff to go further, and affirm that defendant carelessly and negligently brought about or permitted the actual contact. This is the logic of the position, but it is

fallacious in requiring a redundancy of allegation. The essential act of negligence is the primary one of allowing and permitting a wire charged with a subtle and dangerous energy to become broken and hang down upon a public street, where persons lawfully traveling were liable to come in contact with it. In the absence of any contributory act of negligence on the part of plaintiff in bringing about the contact, this becomes the proximate cause, and the injury is indisputably consequential, so that it becomes a matter wholly of supererogation to charge negligence in allowing and permitting the contact, and therefore was not essential to good pleading or the statement of a good cause of action.

3. There is evidence in the record tending to show that John Nagle, an employe of the plaintiff, was engaged in driving the horse attached to a wagon used for the delivery of bread from a bakery, and that just after turning a corner and entering upon College Street the horse suddenly fell. Not being aware of the cause, the driver sprang to the ground, when he observed for the first time a wire hanging close to the wheel of his wagon, emitting sparks and flashes of light. At no time, however, did he see the wire come in contact with the horse. This occurred about 3 o'clock in the morning, while it was yet dark. The night had been stormy and cold, and the streets were wet. The driver went for assistance, leaving the horse where he fell, and it was three quarters of an hour before he regained his feet. In the endeavor to liberate him, and while he was struggling to his feet, the wire was seen to come in contact with him, when he fell again, as described by one of the witnesses, "like he was shot." The witness further states that the wire was throwing off sparks, and at one time he approached so nearly to it as to receive a shock from the ground. The horse was trembling badly when liberated, and seemed to be in great agony. There was blood upon the ground, and he had a cut above his eye, and another on his foot. It was also shown that the wire parted and remained suspended for an hour prior to the accident. Plaintiff having rested, defendant moved for a nonsuit, but without avail, whereupon it produced

evidence tending to show that the night was very stormy, the wind reaching a maximum velocity of 45 miles an hour, and an extreme velocity of 56 miles, which is not extraordinary; that the lines had been in use for seven years, but were of first-class material, and that the wire in question had parted about midway between poles standing 130 feet apart; that the insulation was not broken, except at the point of fracture; that it carried 1,000 volts, but where broken the voltage was much less, being estimated at from 300 to 500; that the wires and the fastenings, and the poles upon which they were carried, were regularly inspected as often as once every other day by a competent electrician; that the company was equipped with the standard and best approved ground detectors, or appliances for detecting or discovering breaks and the grounding of its wires, and that on stormy nights it applied the test every half hour; that upon this occasion the detector did not indicate the parting of the wire, and that the first notice touching its condition came through a member of the police force; that there were no indications as to how the wire came to break; that they sometimes broke of their own accord, but the cause of the present fracture was ascribed either to the crossing of the wires in a gale, or to the blowing of a limb from a tree, or something of the kind across them, causing the current to pass from one to another, thus severing one of them by burning it at the point of contact. Both parties having rested, defendant moved the court to direct a verdict in its behalf, but this was also refused; and error is assigned both as it respects the motion for a judgment of nonsuit and the one to direct the verdict.

In support of its motion for nonsuit, the defendant contends that the proof is insufficient in two aspects to submit the case to the jury: (1) It does not show that the horse was injured by electricity; and (2) it does not show any negligence attributable to the defendant company contributing to the injury. The latest declaration of this court touching the *quantum* of evidence sufficient to carry a case to the jury is found in *Perkins v. McCullough*, 36 Or. 146 (59 Pac. 182), wherein Mr. Jus-

tice MOORE says: "The rule is well settled in this state that if there be any evidence, however slight, fairly susceptible of an inference or presumption tending to establish a material allegation of the complaint, it is the duty of the court to deny the motion for a judgment of nonsuit, and submit the question involved to the jury for determination,"—citing all the preceding cases. From the evidence adduced, it is quite manifest that the jury might reasonably have inferred that the horse came in contact with the heavily charged wire, and that the injury complained of was caused by an electric shock. The manner of its falling, the proximity of the wire, the second shock, which was observed by witness to have been produced by contact with the wire, its result, and the effect produced upon the animal, are amply sufficient from which the jury might reasonably and legitimately have drawn the inference that there was contact with the wire in the first instance, and that the injury ensued from electricity.

4. The other question involves the doctrine of *res ipsa loquitur*,—the thing speaks for itself. The only evidence adduced touching the negligence of the defendant in allowing and permitting its wire to become broken and remain suspended upon a public street is of the simple fact that it was found so broken and suspended, and that the injury to the horse ensued; no attempt being made to show the cause of the fracture, or to show any act of commission or omission, carelessly or negligently suffered on the part of the defendant, conducing thereto. Was this sufficient? The defendant was engaged in the transmission and utilization of a subtle and dangerous energy over and along a public street by means of machinery and appliances presumably under its exclusive management and control, because the erection and maintenance of the system by the defendant has been admitted by its pleadings. The dangerous character of the business imposed upon the defendant a very high degree of care in the maintenance of its apparatus and appliances in a secure and safe condition, and thus to guard against the danger of accident to those in the lawful use and enjoyment of the street. Under

these conditions, when the plaintiff had shown the fracture and the unsafe condition in which the wire was found (being suspended upon a public street), and that injury actually ensued therefrom, he was relieved from the necessity of going further and showing such facts as would exclude all other hypotheses or possibility (as that it was not due to the carelessness or unlawful acts of any third person, or other cause), because the most natural and reasonable inference therefrom is that the wire would not have parted or been out of repair, and the accident would not have happened, but for the neglect of duty enjoined upon the defendant; thus taking the case out of the general rule of law that the mere proof of an accident raises no presumption of negligence. The defendant's primary responsibility, because of the high degree of care with which it was charged; the likelihood that the condition would not have existed, in the ordinary course, if due care had been observed; and its exclusive control and management of the system, so that the plaintiff had not adequate or equal facilities with the defendant for ascertaining or showing from whence the real and actual cause of the parting of the wires arose,—conjunctively operated to relieve the plaintiff from the necessity of showing more in the first instance. Such a showing made for him a *prima facie* case, and imposed upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part; and this it could do by showing due observance of that degree of care enjoined upon it, and, if it had succeeded in that respect, it should have been exonerated. This is within the doctrine of *res ipsa loquitur*,—the defendant being required to give such evidence as would exonerate it,—and the plaintiff was relieved from the burden of proving the nonexistence of an adequate explanation or excuse: *Boyd v. Portland Elec. Co.* 40 Or. 126 (66 Pac. 576, 8 Am. Electl. Cas. —); *Keasbey, Elec. Wires*, §§ 271-273; 2 Jaggard, Torts, 864; *Newark Elec. Co. v. Ruddy*, 62 N. J. Law, 505 (7 Am. Electl. Cas. 524, 41 Atl. 712); *City Pass. Ry. Co. v. Nugent*, 86 Md. 349 (38 Atl. 779); *Uggle v. West End St. Ry. Co.* 160 Mass. 351 (39

Am. St. Rep. 481, 4 Am. Electl. Cas. 389, 35 N. E. 1126); *Larson v. Central Ry. Co.* 56 Ill. App. 263; *Snyder v. Wheeling Elec. Co.* 43 W. Va. 661 (7 Am. Electl. Cas. 473, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922); *Clark v. Nassau R. Co.* 9 App. Div. 51 (4 N. Y. Supp. 78, 6 Am. Electl. Cas. 234). The proof submitted by the plaintiff was, therefore, sufficient, tested by the motion for nonsuit.

5. This brings us naturally to the question presented by the motion to direct a verdict. When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration had been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury: *City Pass. Ry. Co. v. Nugent*, 86 Md. 349 (38 Atl. 779).

6. As bearing upon the amount of damages recoverable, the plaintiff testified that he was a judge of horses; that he purchased the injured horse from private parties five or six years prior to the accident, at which time he was six or seven years old, and paid \$100 for him,—the price asked; that he had been in constant use every day, and was capable of performing the work, but was worth nothing for the service at the present time. Other testimony indicated more in detail the character

of the injury and its effect upon the usefulness of the animal, and in connection therewith he was exhibited to the jury. There was an objection to the plaintiff's testifying touching the value of the horse, on the ground that he did not show himself to be an expert or especially qualified thereto. This was overruled, and properly so. The horse was purchased for the especial business in which the plaintiff was engaged, and used therein for a considerable length of time, and this was sufficient to qualify him to give his opinion as to value: *Mason v. Part-
rick*, 100 Mich. 577 (59 N. W. 239).

7. Plaintiff further testified that he hired other horses to take the place of the one injured, so as to continue in business; that such service amounted to 14 days for one horse; and that he was put to the expense of \$14 therefor. It was insisted that witness should not have been permitted to state the amount paid for the hire of such horses; but the testimony was relevant and competent, as it had some tendency to establish value.

8. Plaintiff also testified that he paid \$4 for repairs to the wagon (mending or replacing the broken shaft), and \$3.35 for repairing the harness, necessitated by having been cut from the horse while down, in order to release him. Referring to these latter items of damages, defendant's counsel asked the court to instruct the jury as follows: "I charge you that the plaintiff has failed to prove the reasonable value of any expenses claimed to have been incurred by plaintiff, caused by the injuries alleged in the complaint to the plaintiff's wagon and harness, and therefore you cannot consider any such damages. The testimony of plaintiff that he paid certain sums of money was not followed by any proof as to their reasonable value, and he cannot recover therefor." This was refused, and error is assigned. It is probably true that testimony touching sums actually paid for expenses necessarily incurred in repairing damaged property and utensils should ordinarily be supplemented with competent evidence that they were reasonable for the services rendered (*Golder v. Lund*, 50 Neb. 867, 79 N. W. 379); but these small items of expense incurred are

matters of such common knowledge that we are disposed to let them rest with the jury, who are fully competent and qualified from their own experience to determine as to their reasonableness.

9. Some instructions were asked and refused, of which defendant complains. One of them was intended to present the same question as the motion to direct a verdict, and hence needs no further notice. Another reads as follows: "That the defendant was entitled to a reasonable time after the fall of the wire in which to repair it, or to remove it out of the way of persons using the street; and if you find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." The instruction is plainly applicable only to cases where the wire had fallen without the negligence of defendant, or was caused by an act of God, or some force that could not have been provided against by reasonable foresight or precaution, and without such modification would have been misleading. It was therefore properly refused. Other instructions requested were clearly covered by the general charge.

There being no error in the record, the judgment of the court below will be affirmed, and it is so ordered. **AFFIRMED.**

Decided 3 June, 1902.

STATE v. HOWARD.

[69 Pac. 50.]

LARCENY OF HORSE—CHANGING BRAND—INSTRUCTION.

1. In trials where a defendant is charged with an offense the evidence to support which may show the commission of a somewhat similar but really different offense, the jury should be clearly instructed as to the difference between the two, and that defendant must be shown to be guilty of the one described in the indictment: thus, a defendant being on trial for horse stealing, under Section 1766 of Hill's Ann. Laws, and it appearing that after getting possession of the horse defendant changed the brand, which is an independent offense under Section 1769 of Hill's Ann. Laws, it is error not to instruct the jury, when requested to do so, that if the animal was taken without an intention to steal it, the subsequent alteration of the brand was immaterial;

41 OR.—4.

41	49
41	885
41	49
48	168

since the two acts are distinct, and the jury may quite possibly have understood that the changing of the brand would justify a conviction for stealing.

IDEM.

2. The refusal to give such instruction was not cured by giving an instruction that, if the horse was taken in good faith, with the intention of returning it to its owner, a subsequently conceived intention to wrongfully convert it would not constitute larceny.

From Baker: ROBERT EAKIN, Judge.

Manny Howard appeals from a sentence for larceny.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. Chas. A. Johns and Geo. J. Bentley.*

For the state there was a brief over the names of *Samuel White*, District Attorney, and *A. B. Winfree*, with an oral argument by *Mr. White*, and *Mr. John McCourt.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

The defendant was convicted of the crime of larceny by stealing a mare, the property of R. R. Palmer and H. E. Denham. The facts are substantially as follows: In the spring of 1901 the defendant and one Meldrum, jointly indicted with him, were riding the range in Baker County, gathering up horses; about the 1st of April Palmer told them he had an I C mare out, and asked them if they found her to take her up, and hold her for him; a few days later they found the animal, and drove her, with other horses, to what is known as the "Deal Corral," where, the next morning, defendant, Howard, changed her brand from I C to H O, by what is known as the "picking process." She was then driven with the band to Meldrum's premises, twelve or fifteen miles distant. About this time Palmer heard that the defendant had his animal, and telephoned Howard, inquiring about the matter. Howard said, yes, they had the mare, and asked what he should do with her, when Palmer told him to leave her in his field when he came down the following Thursday. Shortly thereafter Palmer

learned that all the horses except his had been driven to Ontario for shipment. He went out to the Meldrum place, and got the mare, not thinking, as he testifies, that anything was wrong, until he noticed the brand had been changed.

1. Upon the trial the defendant requested the court to instruct the jury, among other things, that if Howard and Meldrum, acting together, or either of them, took possession of and held the mare alleged to have been stolen, under an agreement with the owner, and with no intention at the time of the taking of stealing her, it would make no difference whether the brand was changed or not, and that, if they should so find, they should disregard any and all evidence as to the change of the brand. The court refused to give the instruction as requested, but did charge the jury generally that a felonious intent must accompany the taking to constitute larceny; that, if the defendant took the mare from the range under the direction or by the agreement or consent of the owner, in good faith, with the intent only to return her to the owner, then a subsequently conceived intention to wrongfully convert her to his own use would not constitute the crime charged; that, although the defendant may have been requested by the owners of the animal to take possession of her, he would, nevertheless, be guilty of larceny, if, at the time of the taking, he had a felonious intent to appropriate her to his own use.

Section 1766, Hill's Ann. Laws, under which the defendant was tried and convicted, provides that, "if any person shall commit the crime of larceny by stealing any horse, gelding, mare, * * such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years," etc. The evidence of the changing of the brand after the mare was taken up from the range and while in the Deal Corral was one of the most important items against Howard. Indeed, without this testimony, it is doubtful whether a conviction could have been had. Now, by Section 1769, Hill's Ann. Laws, it is made a crime for any person to willfully and knowingly alter or deface any artificial brand on any horse, mare, etc., with the intent thereby to convert the

same to his own use. The crime thus defined is entirely different from the crime of which defendant was accused and convicted. The proof, however, was such as tended to show the commission of either offense. It was, therefore, very important to the defendant that the court, in its instructions, should point out to the jury the distinction between the two crimes, and should clearly state the rules by which they were to be guided in arriving at the verdict, so that he might not be convicted of one crime on proof of the commission of another. To secure a conviction under the information upon which the defendant was tried, it was necessary for the state to prove that the animal in question was taken with a felonious intent at the time of the taking. If there was no intention of stealing her at that time, such an intention subsequently formed would not be sufficient. Proof of the change or alteration of the brand was, of course, material and important as tending to show the purpose and intent with which the defendant took possession of the animal, but would not be sufficient to convict, unless the jury believed that the original taking was with a felonious intent. Larceny by stealing an animal and larceny by altering the brand thereon are, under the statute, separate and distinct offenses, and proof of one will not necessarily sustain a conviction of the other. Appreciating the danger of the jury becoming confused on this point, and desiring to avoid a conviction for altering a brand under an information charging larceny by stealing the animal, the defendant requested an instruction that, if possession of the animal was taken with no intention at the time of stealing her, it would be immaterial whether the defendant subsequently changed the brand, or not. In our opinion, this instruction ought to have been given. It was an important point in the case, and was not covered by the general charge. There is nothing whatever said in the instruction, as given, about the effect of altering the brand; nor were the jury advised in any way that the mere altering of the brand with the intent to convert the animal to the defendant's own use would not be sufficient to convict him of the crime charged in the information; if, as a matter of fact, he took her from

the range in good faith, and with an honest intent to return her to the owner.

2. The instruction that, if the defendant took the animal in good faith, and with the intent only to return her to the owner, a subsequently conceived intention to wrongfully convert her to his own use would not constitute larceny, was sound, as to the general rule of law, but it was not sufficiently definite for the guidance of jurors not skilled in the application of abstract principles to concrete facts. It is a fundamental principle of the common law that a defendant cannot be tried for one crime and convicted of another. As the proof in this case tended to show either the crime of larceny by stealing, for which the defendant was being tried, or the crime of larceny by altering the brand, another separate and distinct crime, it was important that the jury be clearly and distinctly instructed as to the rule which should govern them in arriving at their verdict: *Boyd v. State*, 24 Tex. App. 570 (6 S. W. 853, 5 Am. St. Rep. 908); *Williams v. State*, 40 Fla. 480 (25 South. 143, 74 Am. St. Rep. 154). It is manifest that otherwise the defendant might have been convicted of one crime under an information charging him with another. In the absence of the instruction requested, or of one substantially the same, the jury might and could have found that the original taking was by the consent of the owner, and for the purpose of holding the animal for him, but yet that the defendant was guilty of a crime, for which he should be punished, in thereafter changing the brand. In our opinion, the judgment should be reversed, and the cause remanded for a new trial.

REVERSED.

Argued 11 February; decided 3 March, 1902.

RICHMOND v. SOUTHERN PACIFIC COMPANY.

[67 Pac. 947; 25 Am. & Eng. R. Cas. 49.]

CARRIERS—VALIDITY OF LIMITED LIABILITY CONTRACT.

A railroad company which voluntarily designates freight trains to carry passengers, and permits its agents to sell tickets therefor to passengers generally, is a common carrier of passengers by the means so adopted, and its agreement with a passenger, whereby he absolves the company from all liability while riding on such freight trains in consideration of his securing his ticket at a reduced rate, is against public policy, and void: *Honeyman v. Oregon & Cal. R. Co.* 13 Or. 352, distinguished.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action for damages by F. L. Richmond against the Southern Pacific Company, resulting in a judgment for plaintiff, from which defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Fenton & Muir*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief over the names of *Chamberlain & Thomas*, and *Otto J. Kraemer*, with an oral argument by *Mr. Geo. E. Chamberlain*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover damages for a personal injury. The facts are that plaintiff, having secured from the defendant a 3,000-mile passenger ticket over certain parts of its lines of railway, at 2½ cents a mile, subscribed his name to the following stipulation, among others, indorsed thereon, to wit: "When used upon any freight train designated to carry passengers, the Southern Pacific Co. is absolved from all liability as a common carrier for loss of life, personal injury, or loss or damage of baggage or property of the party so using this ticket." The plaintiff, while riding as a passenger, in pursuance of said ticket, in the caboose of a freight train from Oakland to Eugene, was injured by the sudden checking of the

speed of the train. At the time he was injured said train had been designated by the defendant to carry passengers, and its agents sold tickets to all persons applying therefor at the lawful rate of four cents per mile, and such passengers were permitted, without any restriction, to ride upon said train to or from any station on the defendant's railway in Oregon between Junction City and Roseburg, though two passenger trains passed daily over said railway line. The cause being at issue, a trial was had resulting in a verdict and judgment for plaintiff in the sum of \$925, and defendant appeals, assigning as error the action of the court in refusing to grant a judgment of nonsuit, and in giving certain instructions to the jury over its objection and exception.

The only question involved in this appeal is whether a passenger's agreement to absolve a transportation company from all liability as a common carrier, while riding as a passenger upon its freight train, entered into in consideration of his securing a railway ticket at a reduced rate, is void as against public policy. It is contended by defendant's counsel that the railway company, in the discharge of the duty imposed upon it, having furnished adequate passenger trains to accommodate the traveling public, may lawfully enter into a contract with a passenger whereby, in consideration of being carried on a freight train, he exempts the company from all liability for personal injury caused by its negligence or otherwise, and that the validity of such agreement is not impaired by waiving its right to insist upon such contract as to all passengers who may be carried on such train or who may ride thereon by paying a single fare at the full lawful rate. They concede that the rule is general in the state and federal courts, except in Illinois and New York, that a common carrier cannot escape liability from the consequences of its negligence in carrying passengers on trains provided for that purpose; but they maintain that a railway company, not being obliged to carry passengers on a freight train, may contract in relation thereto as a private carrier, and that an agreement of that character is not violative of public policy. Plaintiff's counsel maintain,

however, that the defendant having designated the train upon which their client was riding at the time he was injured to carry passengers, and permitted its agents to sell tickets therefor, and allowed passengers generally to ride thereon, thereby made it a passenger train to all intents and purposes, thus rendering the exception inapplicable, and hence no error was committed in refusing to grant the judgment of nonsuit or in instructing the jury as complained of.

Public policy forbids a railway company from relying upon the terms of a contract entered into with a passenger, whereby he releases it from liability resulting from its negligence while performing a duty it owes the public as a common carrier; but it may become a private carrier, and escape such liability to contract, when as a matter of convenience to, or by special agreement with, a passenger, it undertakes to carry him by means not designated to accommodate the traveling public: *Louisville, etc. R. Co. v. Keefer*, 146 Ind. 21 (44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348). Thus, an agreement of an express agent to assume all risks of accident, in consideration of being carried in a baggage car, to facilitate his own business, releases a railroad company from liability of injury resulting from a casualty, because the agent is not a passenger, and the carrier is under no obligation to transport him in such car: *Blank v. Illinois Cent. R. Co.* 182 Ill. 332 (55 N. E. 332); *Pittsburg, etc. R. Co. v. Mahoney*, 148 Ind. 196 (46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503); *Bates v. Old Colony Ry. Co.* 147 Mass. 255 (17 N. E. 633); *Hosmer v. Old Colony Ry. Co.* 156 Mass. 506 (31 N. E. 652); *Baltimore, etc. R. Co. v. Voight*, 176 U. S. 498 (20 Sup. Ct. 385). The reason assigned for the conclusions reached in the cases cited is based upon the theory that the railroad companies permitted the express messengers to ride in places where the companies were under no obligation to carry them, and without such license the agents would have been trespassers and could have been ejected from such cars. In *Bates v. Old Colony Ry. Co.* 147 Mass. 255 (17 N. E. 633), Mr. Justice ALLEN, in speaking of the plaintiff's agreement to assume the risk incident to

riding in the place agreed upon, says: "The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car." In *Hosmer v. Old Colony Ry. Co.* 156 Mass. 506 (31 N. E. 652), Mr. Justice LATHROP, in speaking of the plaintiff's assumption of the risk of all injuries received while riding in the baggage car, says: "The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience." In *Pittsburg, etc. Ry. Co. v. Mahoney*, 148 Ind. 196 (46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503), the court, in speaking of the agreement entered into between the express company in whose service the decedent was an employe and the right of the latter thereunder, say: "His rights were those of the express company, and could not be greater. He was there by license given the express company, and he could not accept the license, and reject the conditions upon which it was granted."

Where railroad companies, furnishing trackage and motive power, haul the cars of circus and menagerie companies over their lines of railway, in consideration of the latter assuming the risk of injuries incident to the journey, it has been held that such companies and their employes, sustaining damage or injury, could not recover therefor from the railroad companies: *Chicago, etc. Ry. Co. v. Wallace*, 66 Fed. 506 (30 L. R. A. 161, 14 C. C. A. 257); *Robertson v. Old Colony R. Co.* 156 Mass. 525 (31 N. E. 650, 32 Am. St. Rep. 482); *Coup v. Wabash, etc. Ry. Co.* 56 Mich. 111 (22 N. W. 215, 56 Am. Rep. 374); *Forepaugh v. Delaware, etc. R. Co.* 128 Pa. 217 (18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672). The reason assigned in these cases for enforcing the contracts of exemption from liability is that, as the railroad companies were under no legal obligation to haul such cars, they might lawfully enter into any contract to do so, and as a condition precedent therefor were authorized to limit their ability in case of acci-

dent, thus becoming private carriers in respect to such cars. In *Wells v. Steam Nav. Co.* 2 N. Y. 204, Mr. Justice BRONSON, in speaking of the right of such a carrier to restrict its liability, says: "They are not, like common carriers and innkeepers, bound to accept employment when offered, nor, like them, are they tied down to a reasonable reward for their services. They are at liberty to demand an unreasonable price before they will undertake any work or trust, or to reject employment altogether, and they may make just such stipulations as they please concerning the risk to be incurred. They may become insurers against all possible hazards, or they may say, 'We will answer for nothing but a loss happening through our own fraud or want of good faith.' In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain as they think will answer their purpose."

In the case at bar the question of the defendant's liability, or its exemption therefrom, under the contract, must be solved by determining whether it was a common or a private carrier in respect to the plaintiff at the time he suffered the injury of which he complains; for if it sustained the relation of a private carrier to him his agreement exonerates it from liability, but if it was a common carrier in respect to him at that time the contract is contrary to public policy, and therefore void. "A common carrier," says Mr. Justice BRADLEY in *New York Cent. R. Co. v. Lockwood*, 84 U. S. (17 Wall.) 357, "may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain

articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." The principle thus so ably illustrated was adopted by this court in *Honeyman v. Oregon & Cal. R. Co.* 13 Or. 352 (10 Pac. 628, 57 Am. Rep. 20), in which it was held that where the carrier does not hold itself out as a common carrier of dogs, but, as a matter of accommodation to a passenger who was notified of its rules, permits its servant to receive them, such arrangement can only charge the carrier as a bailee or private carrier. In the case at bar a special engagement was entered into between the parties, but such agreement was not wholly a matter of accommodation to the plaintiff. It was rather for their mutual advantage, for it may safely be assumed that, when passenger tickets can be secured at low rates, many persons who would not otherwise travel purchase them for their own advantage. Such purchases necessarily increase passenger traffic, and, if the rate established leaves a margin of profit above the cost of transportation, the increase in the number of passengers ordinarily results in advantage to the railroad company, so that the purchase and sale of the ticket in question may be considered as a source of profit to each party. The question whether the defendant sustained the relation of a common carrier to the plaintiff at the time he was injured, and therefore is liable to him for the damages sustained, notwithstanding his agreement to assume the risk of injury, and to absolve the defendant from all liability therefor, must hinge upon a proper solution of the inquiry whether it was the defendant's business and duty to carry him on its freight train between the stations indicated.

The law imposes upon the railroad company, as a common carrier, the duty of transporting over its lines all ordinary freight delivered to it for that purpose, and of carrying all passengers against whom no legal objection can be successfully interposed, who have complied with the rules of the company

in respect to securing tickets before entering the cars, if there be sufficient room for their accommodation, leaving to the carrier the privilege of dividing the traffic, and of furnishing separate trains for the accommodation of each; and, having exercised the discretion with which it is vested, thereby regulating the manner in which its business is to be transacted, it is under no legal obligation to carry passengers on freight trains or freight on passenger trains: *Hobbs v. Texas & Pac. R. Co.* 49 Ark. 357 (5 S. W. 586); *Arnold v. Illinois Cent. R. Co.* 83 Ill. 273 (25 Am. Rep. 386); *Thomas v. Chicago, etc. R. Co.* 72 Mich. 355 (40 N. W. 463); *Elkins v. Boston & Maine R. Co.* 23 N. H. 275; *Murch v. Concord R. Corp.* 29 N. H. 9 (61 Am. Dec. 631). "A common carrier of passengers," says Judge Thompson in his work on Carriers of Passengers (page 26), "is one who undertakes for hire to carry all persons, indifferently, who may apply for passage." The defendant, having voluntarily designated its freight train to carry passengers between Junction City and Roseburg, thereby became, under the definition adverted to, a common carrier of passengers by the means so adopted, and its special contract in respect to the attempted limitation did not divest it of that character; for, if it is the habit of a railroad company to carry passengers on a freight train, it becomes a common carrier of passengers by that means, and thereby assumes the liabilities of such carriers: *Flinn v. Philadelphia, etc. R. Co.* 1 Houst. 469. The defendant was under no legal obligation to carry passengers on its freight trains, but, having notified the public that it would do so between the stations indicated, the train, as long as it was used for that purpose, was a mixed freight and passenger train, thereby imposing upon the defendant all the duties of a common carrier in respect to any passenger riding thereon. The train in question was designed by the defendant to accommodate the traveling public generally, and was not provided for plaintiff's advantage alone, nor did he enjoy any special privileges thereon that were not extended to others. The defendant's undertaking to carry him by the means adopted for that purpose was a part of the performance

of its business, and within the line of its public duty, as long as such train was used to carry passengers. The ticket purchased by plaintiff was secured for five eighths of the regular local fare, and, while he was a commercial traveler whose business compelled him to make extensive journeys, we understand from the transcript that any person could secure such tickets upon application by paying the same price therefor.

Plaintiff having paid value for his ticket, the contract of carriage could not be canceled at pleasure by the defendant, and we do not think a rebate in the price of a local ticket affords a sufficient consideration for the assumption of the risk undertaken, where no special privileges are conferred, for, if this were so, it would follow that the smallest remission from the regular price of a ticket might suffice for exemption from liability. No error having been committed as alleged, the judgment is affirmed. **AFFIRMED.**

Argued 15 October; decided 28 October, 1901.

OREGON REAL ESTATE CO. v. GAMBELL.

OREGON REAL ESTATE CO. v. PORTLAND.

[86 Pac. 441.]

INVALID STREET ASSESSMENTS—APPLICATION OF CURATIVE ACT.*

Under Section 156 of the Portland Charter of 1898 (Laws, 1898, pp. 101, 163, § 156), providing that if, upon the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied are adjudged to be invalid because of defects, the city can bring actions against the owners of abutting property and recover the cost of such improvement properly chargeable thereunder, a void assessment is not cured, ratified, or confirmed, in the absence of an adjudication that the assessment is invalid: *Thomas v. Portland*, 40 Or. 50, followed.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by the Oregon Real Estate Co., a private corporation, to restrain the City of Portland, its Auditor and others, from

*NOTE.—See, also, *Oregon Real Est. Co. v. Portland*, 40 Or. 56.—REPORTER.

selling certain lots. There was a decree for defendants, from which plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Pipes & Tift*, with an oral argument by *Mr. Martin L. Pipes*.

For respondent there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Duniway*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to enjoin the collection of a street assessment by levy and sale under a warrant issued by authority of the City of Portland, and to declare the assessment void, which plaintiff avers is a cloud upon its title. On July 21, 1897, the Common Council of the City of Portland passed an ordinance declaring it expedient and necessary to repair the elevated roadway on Grand Avenue from the north line of East Everett Street to a line 137 feet north of East Flanders Street, and directing that the cost of such repair be assessed upon the adjacent or abutting property. When notice was given of the city's intention to make the repair, the plaintiff filed a remonstrance in opposition thereto, and against the assessment of the cost thereof upon the property involved. Plaintiff was the owner of fractional lot 5, all of lot 6, and the south 37 feet of lot 7, in block 111; lots 5, 6, and 7, and fractional lot 8 in block 110; the south 37 feet of lot 2, and fractional lot 3, block 112; and lots 1, 2, 3, and 4, block 113,—in East Portland, now the City of Portland, which constitutes more than one half of the property adjacent to that portion of the street sought to be repaired; but, notwithstanding, the common council disregarded the remonstrance, proceeded with the repair, and assessed the cost thereof against the plaintiff's said property. These facts appear by the complaint, and, a demurrer thereto having been sustained, the plaintiff refused to plead further, whereupon a decree was entered dismissing its complaint, with costs, from which this appeal was taken.

It is conceded by counsel for the defendants that the city was without power to make the repair and assess the cost thereof against the plaintiff's property in the face of such remonstrance, it being the owner of more than one half of the property affected thereby. The case of *Cook v. Portland*, 35 Or. 383 (58 Pac. 353), is deemed decisive of the question; but it is urged that section 156 of the city charter, now in force (Laws, 1898, pp. 101, 163, § 156), is curative of the defect, and operates to take away or deprive plaintiff of its right to prosecute a suit to nullify the assessment, and that this question may be raised under a general demurrer. We have determined, however (*Thomas v. Portland*, 40 Or. 56, 66 Pac. 439), that the purpose and operation of such section was not to validate, *ex proprio vigore*, all assessments for improvements attempted, where the proceeding proved in some form or particular to be irregular or insufficient, measured by the prescribed requisites under the charter, but that it was intended as a new and more efficacious remedy, to be invoked only when the assessment had been found or adjudged to be invalid for some reasons suggested thereby. This being a suit to test the validity of the primary assessment, the provisions of section 156 do not stand in the way of its prosecution to final determination; and hence the demurrer was erroneously sustained, and the complaint should not, therefore, have been dismissed. In justice to the court below, it may be added that this point was made here for the first time, and the demurrer was sustained before the case of *Cook v. Portland*, 35 Or. 383 (58 Pac. 353), was decided. The decree of the court below will be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may seem appropriate.

REVERSED.

Decided 10 March; rehearing denied 21 April, 1902.

TAFTE v. OREGON RAILROAD COMPANY.

[67 Pac. 1015; 68 Pac. 732.]

CARRIERS—CONNECTING LINE—CONTRACT OF SHIPMENT.

A contract of shipment of goods consigned to New York was made upon the carrier's printed form of bill of lading, containing a blank space for the place of destination, with directions not to insert points not on the carrier's lines. The blank was not filled. The written part of the contract provided for "fastest passenger train service, consigned as above." A stipulation relieved the carrier from liability for loss or injury to the property, except on its own lines. *Held*, that the blank space for the destination of the goods was reserved for points on carrier's own lines, and that the written part of the contract was a designation of the destination with a contract as to the kind of service to be furnished to the termination of the line of the contracting company, subject to the stipulation as to liability beyond its own line; and therefore the contracting carrier was not liable for loss or damage on lines beyond its own.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by I. H. Taffe against the Oregon Railroad & Navigation Co. On September 17, 1898, the plaintiff shipped at Celilo Station, in Oregon, by defendant's railroad, one car load of fresh salmon, consigned to Chesebro Bros., Fulton Market, New York City. The bill of lading, signed by the shipper and the defendant's agent, so far as it is necessary to set the same forth for an intelligent understanding of the controversy, is as follows:

FORM NO. 593.

BILL OF LADING

No. _____

Oregon Railway & Navigation Co.

E. MCNEILL, RECEIVER.

Celilo, Sept. 17th 1898

Received of I. H. Taffe

the following described freight, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to-----

Do not insert point not on the lines of this system.
and delivered in like good order to the consignee at said station, wharf

or landing (or, if said freight is to be forwarded beyond the lines of this company, to such company or carriers whose line may be considered a part of the route to the place of destination), on payment of freight charges, together with such charges as shall have been advanced on the same.

This contract, and the responsibilities of the parties thereto, is limited and controlled by the conditions printed on the back hereof, as also by the terms and conditions of this company's printed tariffs, which are hereby declared to be an essential part of this contract. * *

OREGON RAILWAY & NAVIGATION CO.

E. MCNEILL, Receiver.

ORIGINAL

By *E. B. Coman, Condr.* Agent*I. H. Taffe,* Shipper

(This original Bill of Lading must be filled out and signed with ink or indelible pencil and delivered to Shipper.)

CONSIGNEE, MARKS AND DESTINATION

*Chesebro Bros., Fulton Market,**New York**City*

No. Packages	ARTICLES.	WEIGHT Subject to Correction
	<i>One F. G. E. car No. 14685</i>	
	<i>fresh salmon about</i>	
	<i>9½ tons on fastest passenger</i>	
	<i>train service consigned as above</i>	

The following is a true copy of the back of said bill of lading, so far as material here:

CONDITIONS.

* * * * *

The company will not be responsible or liable for any loss, damage, or injury to property except upon its own lines, and will not be responsible for any loss, damage or injury to property after the same shall have been tendered to any connecting carrier or freight man for further transportation.

Loss having occurred by reason of delay in transportation and a decline in the New York market, this action was instituted to recover damages therefor based upon the bill of lading. The defendant, for a separate defense, alleges, in effect, that it is the owner of a line of railroad extending from Portland to Huntington, at which point it connects with the Oregon Short Line, extending to Granger, where the latter line connects with the Union Pacific Railway, extending to Council Bluffs, at which point other connecting lines extend to Chicago, and from there other lines extend to New York City; that defendant did not own, or have any interest in the operation of, any of said lines of railway east of Huntington, all of which plaintiff well knew, and that the contract mentioned in the complaint, and by the answer fully set up, was entered into with full knowledge of said matters; that on the 17th day of September, 1898, at Celilo, Oregon, the plaintiff tendered to E. B. Coman, the conductor on the fastest east-bound passenger train, the car of salmon in question; that when so tendered the plaintiff and said conductor signed the bill of lading, and that plaintiff and defendant entered into no other contract relating to the transportation, other than evidenced thereby; that the defendant carried said car to Huntington by said fastest passenger train without delay, and there delivered the same, as a part of said train, to the Oregon Short Line Railroad Co., to be forwarded through like trains to destination; that said car was immediately transported by said fastest passenger train on its journey to Granger by the Oregon Short Line Railroad Co., without delay; that from thence said car was so transported to Chicago, and that the delay complained of occurred after the same had reached Chicago, without fault or negligence on the part of the defendant, but solely as a result of the negligence and fault of the carriers operating east of Chicago, in failing to transport said car by fastest train service on said roads, and not otherwise. A demurrer interposed to this defense was sustained, and the case went to trial on the stipulation of the parties, whereby it was agreed that the bill of lading constituted the sole agreement between the

parties for the transportation; that defendant owns and operates a line of railroad extending from Portland, through, Celilo, eastward to Huntington, where it connects with the Oregon Short Line, from whence other connections are made with railroads extending to Council Bluffs, thence to Chicago, and from thence to New York City; that the car was transported by the defendant on the fastest passenger train service to Huntington, and there delivered, as a part of the train, to the Oregon Short Line Railroad Co., to be forwarded by said train and through like trains to New York City; that said car was transported to Chicago on like fastest passenger trains without delay, but at some point east of that place it was, in violation of the instructions of the defendant to the Oregon Short Line Railroad Co., dropped from said fastest passenger train service, and was thereby delayed. An objection interposed by plaintiff to the introduction of the latter clause of the stipulation in evidence being sustained, and no other evidence being offered, the court instructed the jury to return a verdict for the plaintiff; and judgment having been entered upon the verdict so returned, the defendant appeals. REVERSED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. William W. Cotton*.

For respondent there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

Two errors were assigned; one relating to the court's action in sustaining the demurrer to the separate defense, and the other in rejecting, as immaterial and irrelevant, the latter clause of said stipulation, both of which present but a single question; that is, whether the contract or agreement relied upon by plaintiff, and which is admitted by both parties to be

the only one entered into with reference to the transportation of the car of salmon, is an undertaking on the part of the defendant to carry it to Huntington only, and deliver it to its connecting line, or to carry it through to Fulton Market, New York City. The contract, like others, must be construed by looking through the whole instrument, and in the light of the circumstances attending the transaction and its execution by the parties concerned. The law applicable to the simple receipt or acceptance of goods by common carriers, directed or consigned beyond the line of the carrier, by the conceded weight of American authority, requires them to be transported to the terminus of its lines, and there delivered to a connecting carrier to be forwarded to their destination, and with this the responsibility ceases. This is the doctrine of the Supreme Court of the United States and a large majority of the state courts: *Hutchinson*, Carr. § 149; 4 *Elliott*, Railroads, §§ 1432, 1435; *Gray v. Jackson*, 51 N. H. 9 (12 Am. Rep. 1); *Hoffman v. Cumberland R. Co.* 85 Md. 391 (37 Atl. 214); *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. (16 Wall.) 318; *St. Louis Ins. Co. v. St. Louis, T. H. & I. R. Co.* 104 U. S. 146; *Myrick v. Michigan Cent. R. Co.* 107 U. S. 102 (1 Sup. Ct. 425); *Taylor v. Maine Cent. R. Co.* 87 Me. 299 (32 Atl. 905); *Dunbar v. Port Royal & A. Ry. Co.* 36 S. C. 110 (15 S. E. 357, 31 Am. St. Rep. 860); *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396 (31 N. W. 519); *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110 (34 N. W. 269); *McEacheran v. Michigan Cent. R. Co.* 101 Mich. 264 (59 N. W. 612); *Hoffman v. Union Pac. R. Co.* 8 Kan. App. 379 (56 Pac. 331). "A railroad company is a carrier of goods for the public," says Mr. Justice FIELD in *Myrick v. Michigan Cent. R. Co.* 107 U. S. 102 (1 Sup. Ct. 425), "and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or their consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is super-

added to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such lines, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it."

By the English rule, and by the doctrine of some of the courts of this country, such a receipt of goods for transportation, without else to indicate the intent of the parties concerned, implies, *prima facie*, an undertaking or contract upon the part of the carrier to convey them to the point of destination, as indicated by the direction or consignment, whether the carrier owns or controls all the lines of transportation in the route of their travel or not: Hutchinson, Carr. §§ 146, 147; 4 Elliott, Railroads, § 1435. The distinction between the two rules is that by the former the duty implied is to carry the goods to the end of the receiving carrier's line, and there to deliver them to the next carrier in the route, to be forwarded thereby [*Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. (16 Wall.) 318]; while by the latter the duty implied is to carry them through to their destination. The engagement, of course, may be varied in either case by express contract, or the circumstances attending the shipment may raise a different obligation by implication: and thus, in order to exempt the carrier beyond its own lines, under the English rule, there must be an express or implied limitation or restriction of primary liability; and to enlarge the liability, under the American rule, there must be an express or implied understanding to that effect, aside from the mere receipt of the goods destined to a point beyond the route of its own authority. The so-called American rule is perhaps better grounded in equal justice towards the shipper and carrier, and in public policy, and is therefore preferable upon principle, as well as by the preponderance of American authority.

Both the parties to the shipment were cognizant of the fact

that defendant's line of railroad extended no further east than Huntington. This is admitted by the averments in the separate defense, which must be taken as true as against the demurrer, and by the stipulation entered into relative to the facts attending the controversy; and it must be supposed that the contract was entered into in view of the legal rights of the shipper and carrier. As the bill of lading contains the whole contract, and does not depend for substantiation upon the proof of extraneous facts or circumstances, the controversy is resolved into a question of construction, which is solely for the court to determine. Plaintiff's counsel submit that, by a proper construction of the contract, it should be made to read as follows: "The Oregon Railroad & Navigation Co., has on this 17th day of September, 1898, received from I. H. Taffe, at Celilo, Oregon, one F. G. E. car, No. 14685, containing nine and one half tons of fresh salmon, consigned to Chesebro Bros., Fulton Market, New York City, which it agrees, in consideration of the freight to be charged therefor, to transport without unnecessary delay, by the fastest passenger train service, to Fulton Market, and there deliver the same to the consignee." Such a rendition, it is insisted, is the reasonable deduction to be made from the manner in which the contract was drawn, and the particular kind of service to be afforded. Referring to the bill of lading, it will be noted that the blank following the words "to be transported to" is left unfilled, and the words "on fastest passenger train service" are written, which allows them to stand in preference to printed matter. As to the blank, it is apparent from an inspection of the instrument what was intended to be inserted. There is a direction immediately beneath not to insert points not on the line of this system; so that its manifest use was for points on the line of the Oregon Railroad & Navigation Co.'s transportation system, and could not serve the purpose of inserting any point of destination beyond its lines. And there is no particular significance to be attached to the fact that the blank was not supplied, as it cannot be assumed, in the absence of evidence respecting the point intended to be inserted, and in

direct contravention of the instruction on the face of the instrument itself, that it was intended for the place of final destination. The omission, therefore, must be regarded as clerical in character, and affords no suggestion of significance for construction: *Myrick v. Michigan Cent. R. Co.* 107 U. S. 102 (1 Sup. Ct. 425); *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110 (34 N. W. 269); *Phillips v. North Carolina R. Co.* 78 N. C. 294; *Ortt v. Minneapolis & St. Louis R. Co.* 36 Minn. 396 (31 N. W. 519); *Hoffman v. Union Pac. R. Co.* 8 Kan. App. 379 (56 Pac. 331). A further reading of the first clause makes it more apparent that the place of destination, where beyond the lines of defendant's system, was not intended, for there is inserted parenthetically a clause, in effect, that, if such freight is to be forwarded beyond the lines of the company, then it is to be delivered to such company or carriers whose line may be considered a part of the route to the place of destination; and thus does the contract, by its very terms, read into it the law as we have ascertained it to be when the shipment is to a point beyond the lines of the company receiving the goods for carriage,—containing simply a direction denoting the place of consignment. The particular kind of service to be rendered was transportation “on the fastest passenger train service.”

The stipulation must certainly prevail to its fullest import, but what is its significance? Looking upon the face of the bill of lading, we find by the first clause that the goods were received of Taffe, “marked and consigned as noted below,” and the written part denotes a consignment “as above,” and in either instance the reference is to the direction, “Chesebro Bros., Fulton Market, New York City,” so that the consignment is nothing more than the ordinary one of designation by direction of the place of destination, without restriction or enlargement. This brings us to the especial and emphatic contention of counsel, which is that the service contracted for was a special one; that is to say, that the company agreed to carry a perishable quality of freight by fastest passenger train service, and, being a service that neither it nor any con-

necting road was required or obliged to perform, that therefore it must be presumed plaintiff contracted for through transportation. We are not satisfied that such conclusion follows. Plaintiff, by the allegations of his complaint, has, in effect, made the defendant, at least, if not all connecting lines, a common carrier of the kind of freight thus offered, and in the manner designated; for it is averred that, "when requested to do so by shippers, it was the custom and practice of the said defendant, as such common carrier, in consideration of the payment of the sums charged therefor by the defendant, over and above the amount charged for ordinary freight transported by freight trains, to receive perishable freight in refrigerator cars, requiring speedy transportation, and to attach such cars containing such freight to, and transport the same over said line and connecting lines by and as a part of, said passenger trains, to the said city of New York." This allegation is admitted by the answer, except as there is any implication of the practice or custom on the part of the defendant to accept and carry such freight in the manner designated to the City of New York, or any point beyond its lines. Under the conditions thus existing, the plaintiff has made the defendant, at least, a common carrier of fresh salmon, in the manner described, for it could reject no freight of a like kind for like transportation by fastest passenger train service: 4 Elliot, Railroads, §§ 1474, 1475; *Beard v. Illinois Cent. R. Co.* 79 Iowa, 518 (44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381); *International & G. N. R. Co. v. Young* (Tex. Civ. App.) 28 S. W. 819; *North Penn. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727 (8 Sup. Ct. 266).

Now, are we to assume that the defendant is the only company that is a common carrier in that sense, or would it be more reasonable to assume that, by reason of the fact that it was willing to accept goods of the kind to be carried by a rapid service, its connecting roads are doing the same thing? If it was once conceded that its road was the only one conveying the special kind of freight on the particular condition, the presumption might be said to follow, without more, that

it was the intendment to contract for carriage to destination; otherwise the freight would not have been received. But such is not the case here, and we would rather incline to the view that the parties contracted with reference to the preferable assumption that other connecting lines were customarily engaged in like freight traffic, and were therefore bound to the same service when like freight is offered. But whether the freight was received to be transported as by a common carrier or in a private capacity, there must be an express or implied undertaking to carry beyond the lines of the carrier first receiving the goods for transportation, and such a one is not deducible from the contract relied upon. The stipulation contained upon the back, and expressly made a part of it, also lends support to this view. The expression "on the fastest passenger train service" is simply a designation as to how the freight should be carried, being the kind of service contracted for, which language is employed with reference to the car of fresh salmon "consigned as above." It does not indicate an intendment of carriage to destination any stronger than if it had read "on ordinary freight train service;" so that the agreement on the back should be accorded the same weight that it would have if the contract was one with reference to the receipt of ordinary freight, to be carried in the ordinary way. The stipulation referred to is that "the company will not be responsible or liable for any loss, damage, or injury to property, except upon its own lines, and will not be responsible for any loss, damage, or injury to property after the same shall have been tendered to any connecting carrier or freight man for further transportation," so that, construing the contract as a whole, in the light of the circumstances and conditions under which it was entered into and executed, it must be held to be an undertaking to carry to Huntington, and there deliver in good order to the Oregon Short Line Railroad Co., the next connecting line. True, an ordinary freight bill of lading was used, but it is reasonable to suppose that it would not have been used if it had not been

considered appropriate to evidence the true nature of the contract.

We have not overlooked the case of *Colfax Mount Fruit Co. v. Southern Pacific Co.* 118 Cal. 648 (50 Pac. 775, 40 L. R. A. 78). That case, however, turns upon the interpretation of the meaning of the word "forward," which was used in three different and distinct clauses of the contract; and, it having been necessarily used in two of them in the sense of "to carry," it was quite logically held to have been employed in a like sense in the other clause, so the contract was interpreted as an undertaking to carry to destination, and this upon the face of the instrument itself. The case could not, therefore, be controlling. From these considerations, the judgment of the trial court will be reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

REVERSED.

Decided 21 April, 1902.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

In plaintiff's petition for a rehearing the opinion in this cause seems to be interpreted as holding to the doctrine that the stipulation in the bill of lading, "on fastest passenger train service," "was a mere matter of designation of one service among many, and imposed no other obligation upon the defendant than if the designation had been by ordinary freight, assuming thereby that it, in either case, had no binding effect upon the company, and, even if the company had accepted the goods under either designation, it was not bound to carry them as directed, but might disregard its agreement at pleasure." If such is the effect of the decision, we agree with counsel that it is an "impossible" doctrine. But the opinion does not so hold. The contract of shipment was interpreted, as other contracts are, by looking through its whole scope, and in the light of the circumstances attending its execution. One feature of the attending conditions, and an

important one, was admitted by the pleadings, which was that it was the custom and practice of the defendant, when requested by shippers, to receive perishable freight requiring speedy transportation in refrigerator cars, and to attach such cars to, and transport the same over its lines, by and as a part of, its passenger trains. The allegations of the complaint extended further, and included the whole route to New York City in the service; but they were treated as denied as to the entire route, and hence not pertinent as bearing on the construction of the contract, except as the alleged custom and practice of carrying perishable freight applied to defendant alone and to its own lines. This made the defendant a common carrier of this kind of freight in the way designated, namely, "on the fastest passenger train service." From this, and the fact that the company was willing to contract for such service, we concluded it the preferable assumption that other connecting lines were offering a like service, and were common carriers in that sense as was the defendant, not that the contract entered into with the Oregon Railroad & Navigation Co., was a contract with every other connecting line in the route to New York City. If common carriers, however, in the sense that the pleadings make the defendant, they would be in duty bound to accept the perishable freight offered and carry it by fastest passenger train service, as they would be required to accept ordinary freight on freight train service and carry it to the place of consignment. These are conditions or circumstances attending the entering into the contract of shipment involved. So, in our construction of the contract, taking into consideration all of its terms of positive stipulation and of negation, we say the expression, "on fastest passenger train service," is simply a designation as to how the freight should be carried, being the kind of service contracted for, and distinguishes it from such service as is offered for the carriage of ordinary freight, and, therefore, that the stipulation has no greater significance than if a stipulation "on ordinary freight train service" had been introduced in a shipping contract for ordinary freight. There was no inti-

mation intended by the opinion that such a stipulation might be disregarded at pleasure, and was of no binding force upon the carrier. It bound the defendant to carry by that service, and if connecting lines were engaged in the same service, and common carriers in that sense, they would be as much bound to pick it up and carry it on with like celerity as they would be bound to pick up ordinary freight offered on ordinary freight train service and carry it in that way to the end of their lines or to destination. In this light, the words "on fastest passenger train service," were no more significant of an undertaking to carry to destination than the words "on ordinary freight train service," if introduced in a contract for the shipment of ordinary freight. But in any event, whatsoever be the capacity in which the freight was received to be transported, whether as common or private carrier, there must be an express or implied undertaking to carry beyond the lines of the carrier receiving the goods. "Fulton Market, New York City," is but a designation of the place of consignment, and these words, and the stipulation, "on fastest passenger train service," do not constitute an agreement of carriage to that place, unless another stipulation is read into the contract, and this the court is not at liberty to do. So that upon the whole we are satisfied that the contract is susceptible of no other interpretation than an undertaking to carry the freight to Huntington, and there deliver it to the Oregon Short Line, and that none other can reasonably be extracted from it.

The petition for rehearing is therefore denied.

REHEARING DENIED.

Argued 20 February; decided 17 March, 1902.

BYERS v. FERGUSON.

[65 Pac. 1067; 68 Pac. 5.]

DISMISSING APPEAL—DEFECTIVE ABSTRACT.

1. Where an appellant has filed an abstract of the record instead of a transcript, as allowed by Section 541 of Hill's Ann. Laws, as amended by Laws, 1899, pp. 227, 229, and has inadvertently filed a copy of the judgment lien docket, instead of a copy of the judgment order, with the notice of appeal and the undertaking, as required by said section, the appeal should not be dismissed, and the party should be allowed to substitute the proper papers for the one filed by mistake.

REPLEVIN—MEANING OF WORD "DISTRAIN."

2. The meaning of the word "distrained" as used in Hill's Ann. Laws, § 42, subd. 2, designating the venue of actions for the recovery of personal property "distrained for any cause," is a holding of the personal property of another for any purpose or for any cause.

VENUE IN REPLEVIN—ERROR CURED BY PLEADING OVER.

3. A complaint in a replevin action should state where the property is detained as well as where it was taken, but an omission to so state is not a fatal defect after an answer has been filed and judgment has been entered: *Moorhouse v. Donaca*, 14 Or. 430, cited.

JUSTICES' COURTS—RULES OF PRACTICE—REPLEVIN.

4. The rules of procedure in justices' courts being the same as the rules in courts of record since 1899 (Laws, 1899, pp. 109, 111, § 12), and it being the duty of the circuit court on appeal to try the case anew, disregarding irregularities or imperfections in matters of form (Laws, 1899, pp. 109, 118, § 47), a replevin complaint in a justice's court alleging only the venue of the seizure, and being silent as to the venue of the detention, is sufficient after answer and trial, as, applying the rules prevailing in the courts of record, it might be implied from the allegation as to the locality of the taking that the property remained within the county.

NATURE OF TRIAL ON APPEAL FROM JUSTICE'S COURT.

5. The trial *de novo* in the circuit court contemplated by Laws, 1899, pp. 109, 118, §§ 47, 48, providing that on appeal from a justice's court the case shall be tried anew, is a trial on the issues of fact made by the pleadings in the lower court, and the circuit court on appeal has no jurisdiction to entertain a demurrer for a defect curable by judgment, which has already been waived by pleading over.

From Polk: GEORGE H. BURNETT, Judge.

This action was commenced in a justice's court, where plaintiff prevailed. On appeal the circuit court sustained a demurrer to the complaint and dismissed the action, whereupon plaintiff appealed. Further facts appear in the opinion.

A motion to dismiss the appeal was overruled, appellant was allowed to amend and complete his record, and the appeal was decided on its merits. MOTION OVERRULED; REVERSED.

ON MOTION TO DISMISS THE APPEAL.

Mr. Frank Holmes, for the motion.

Messrs. B. F. Bonham and C. F. Martin, contra.

PER CURIAM. 1. This is a motion to dismiss the appeal on several grounds, none of which require particular notice, except the contention that the transcript does not contain a certified copy of the judgment of the court below. The appellant availed himself of the provisions of section 541 of the statute, as amended in 1899 (Laws, 1899, p. 229), and filed an abstract in lieu of a transcript. In such a case the law requires that, in addition to the printed abstract, the appellant shall file a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and the undertaking on appeal. The object of this provision is to furnish evidence that a genuine, *bona fide* controversy was tried and determined in the court below, and a judgment or decree rendered thereon. In the case at bar an attempt was made to comply with this requirement, but the clerk, in place of sending up a copy of the judgment, inserted a transcript of the judgment lien docket. As this, however, was evidently unintentional, and can be corrected, the motion to dismiss will be denied, and an order made directing the clerk below to send up a certified copy of the judgment from which the appeal is taken. MOTION OVERRULED.

ON THE MERITS.

This action was commenced in the justice's court of District No. 5, Polk County, Oregon, to recover the possession of personal property. The plaintiff alleges in the complaint that he is the owner and entitled to the possession of a gray horse,

valued at \$50, and a set of harness, at \$20, which the defendant, in said county and state, unlawfully took from his possession, and detains the same, to his damage in the sum of \$20; that he demanded of the defendant the return of the property on the ground that it was exempt from execution, but he refuses to comply therewith, and still wrongfully withholds the same. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, an answer was filed denying the material allegations of the complaint, and averring a justification of the seizure and detention by the defendant, as constable, under a writ of attachment in an action brought by C. L. Pearce against the plaintiff. A reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a judgment as prayed for in the complaint; and defendant appealed to the circuit court of said county, where the demurrer interposed in the justice's court was sustained, and the court, refusing to permit the complaint to be amended, dismissed the action, and plaintiff appeals to this court.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. B. F. Bonham* and *Mr. Carey F. Martin*.

For respondent there was a brief and an oral argument by *Mr. Frank Holmes*.

MR. JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

2. An action at common law to recover the possession of personal property was treated as local, and could only be maintained in the county where the property was unlawfully taken: *Cobbey*, Repl. § 564; *Kirk v. Matlock*, 12 Or. 319 (7 Pac. 322). The statute prescribing the place of trial in actions of this character is as follows: "Actions for the following causes shall be commenced and tried in the county in which the subject of the action, or some part thereof, is situated: * * (2) For

the recovery of personal property distrained for any cause." Hill's Ann. Laws, § 42. While the word "distrain" originally meant the taking of the property of another as security for the performance of some obligation (3 Bl. Comm. 231) the term "distrained," as used in the section of the statute quoted, undoubtedly signifies the holding of the personal property of another for any purpose whatever.

3. The right to maintain an action in the nature of replevin in a given forum does not depend upon the place where the property is taken, but rests solely upon the county in which it is unlawfully held at the time the action is instituted. Such action is therefore local, and can only be prosecuted in the county where the property is distrained; and, its *situs* being necessary to jurisdiction of the subject-matter, the advisability of alleging in the complaint the county in which the property is distrained is apparent. This the plaintiff failed to do, and the demurrer interposed in the justice's court challenged the sufficiency of the complaint in this respect, which being overruled, the defendant answered over; and, if the rules applicable to the trial of actions in the circuit court are to prevail in the justice's court, the averment in the complaint that the property was unlawfully taken in Polk County was cured by the judgment, from which it would be implied that such property at the time the action was instituted was detained in that county. Thus in *Moorhouse v. Donaca*, 14 Or. 430 (13 Pac. 112), it was held that a complaint in an action for the recovery of personal property which alleges only a wrongful taking within the county in which the action is brought, is bad on demurrer, but in the absence of such objection the pleading is sufficient to support evidence of the *situs* of the property when the action was begun. Mr. Justice THAYER, in speaking of the failure of the complaint to show where the property was kept when the action was commenced, says: "If a defendant in such an action desires to raise a question of that character, he should do so by demurrer; and, if that is overruled, he may stand upon it, and not answer over, otherwise he will waive the point." It follows

that, if the action was triable in the circuit court upon the issue of fact made in the justice's court, an error was committed in sustaining the demurrer.

4. The act of February 17, 1899 (Laws, 1899, p. 109), provides, in effect, that the rules of procedure in a court of record shall govern in determining the forms and sufficiency of pleadings in a justice's court: Section 12. It also provides, in section 47, that, when the appeal from the justice's court is perfected, the circuit court shall have jurisdiction thereof, and must proceed to hear, determine, and try the same anew, disregarding any irregularity or imperfection in matters of form which may have occurred in the justice's court. Section 48 provides that the circuit court on appeal may allow the pleadings in the action to be amended so as not substantially to change the issues tried in the justice's court, or to introduce any new cause of action or defense. Considering these clauses *in pari materia*, does the power vested in the circuit court on appeal, to try the cause anew, authorize it to determine the sufficiency of each pleading sent up, as if it had been originally filed in such court? If the complaint filed in the justice's court had failed to state facts sufficient to constitute a cause of action, the right of the circuit court on appeal to sustain a demurrer to such pleading based upon that ground is unquestioned, though such objection had not been made in the lower court. Hill's Ann. Laws, § 71; *Bowen v. Emmerson*, 3 Or. 452; *Evarts v. Steger*, 5 Or. 147; *Ball v. Doud*, 26 Or. 14 (37 Pac. 70); *Hargett v. Beardsley*, 33 Or. 301 (54 Pac. 203). The complaint having alleged that the defendant, in Polk County, wrongfully took the horse and harness from the plaintiff's possession, the failure to aver that the property was in the county at the time the action was commenced was not an entire want of a material averment, but a defective statement of the facts respecting the venue of the action, but sufficient to base a presumption thereon that, the property having been taken in said county, it was also held therein: *Moorhouse v. Donaca*, 14 Or. 430 (13 Pac. 112). The rules for determining the sufficiency of a pleading in a justice's court being the same as in a court of record, it follows that while the justice's court,

in overruling the demurrer to the complaint, committed an error, such error was waived by the defendant's answering over: *Olds v. Cary*, 13 Or. 362 (10 Pac. 786); *Drake v. Sworts*, 24 Or. 198 (33 Pac. 563). So, too, when a demurrer is overruled, and the party pleads over, the demurrer is abandoned, and ceases to be a part of the record: *Wells v. Applegate*, 12 Or. 208 (6 Pac. 770).

5. As we understand the transcript, the demurrer sustained by the circuit court was the one interposed in, and overruled by, the justice's court; and the defendant having answered over, such demurrer ceased to be a part of the record. The trial anew in the circuit court on appeal, as we understand the term, means a new trial by the introduction of original evidence upon the issue as made in the justice's court. The issue ultimately made in that court was an issue of fact, which was to be tried in the circuit court, on an appeal, not upon errors assigned, but as if such cause had never been tried. The demurrer in question interjected an issue of law which had been waived, and, this being so, the court erred in sustaining it, and for this reason the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 6 March; decided 7 April, 1902; rehearing denied.

TUCKER v. NORTHERN TERMINAL COMPANY.

[68 Pac. 426; 11 Am. Neg. Rep. 629.]

PLEADING CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

1. In actions for personal injuries it is not necessary to allege or prove lack of contributory negligence by the plaintiff: *Johnston v. Oregon S. L. Ry. Co.* 23 Or. 94, cited.

RAILROADS—DEATH WHILE COUPLING CARS—ASSUMED RISK.

2. A railroad employe was used to coupling flat cars loaded with iron rails, which usually shift in transit. In an action for his death, it appeared that, while thus employed, a flat car was "kicked" toward a loaded car, and, while endeavoring to couple them, he was caught between the projecting rails and the moving car. No one saw the accident, but it occurred before sunset, and his view of the cars was unobstructed, though what his position was before the cars came together was not shown. It was apparent that he must have stooped to avoid the danger at the time of the accident. Held, that it was an ordinary risk of his employment, which he had assumed.

41	82
44	242
41	82
45	272
45	484
41	82
47	434
41	82
48	39

CARE REQUIRED OF RAILROAD TERMINAL COMPANY.

3. A terminal company engaged in receiving and switching cars from railroad companies is not bound to the same degree of care for the safety of its employes as a regular railroad company engaged in general transportation business.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Jane Tucker, administratrix of James A. Tucker, deceased, against the Northern Pacific Terminal Co. Plaintiff was nonsuited, and she appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Watson & Beckman*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

MR. JUSTICE MOORE delivered the opinion.

This is an action by Jane Tucker, as administratrix of the estate of James A. Tucker, deceased, against the Northern Pacific Terminal Co., a corporation, to recover damages for a personal injury sustained by her intestate, causing his death. The plaintiff alleges, in substance, that the defendant is in possession of a railroad terminal yard in Portland, Oregon, and engaged, among other things, in repairing freight cars, readjusting their loads, and in making up trains; that on July 10, 1899, it received from the Southern Pacific Co., a freight car in a damaged condition loaded with iron rails, which had shifted, so that their ends extended over the end of the car from one to three feet; that the company repaired the car but did not rearrange its load, and four days later, knowing the condition of the car and its load, and that any attempt to couple it to another car would expose a switchman to unnecessary danger, carelessly ordered James A. Tucker, a car coupler and switchman in its employ, to make such coupling; that, not knowing, and unable to ascertain, the distance which the rails extended, unconscious of the danger to which he was

exposed, and in pursuance of the command, he undertook to make the coupling, and while thus engaged, and in the exercise of due care, his head was caught between the projecting rail and an iron guard upon the rear end of the approaching car, and so crushed that he died in a few minutes; that the injury was caused by the negligence of the defendant, without any fault or want of due care, skill, prudence, or caution on the part of the deceased.

The answer after denying the material allegations of the complaint alleges, in effect, among other things, that it was the business of the defendant to receive cars from railroads terminating in its yard to be made up into trains; that cars loaded with iron rails are frequently received by it, and inspected by persons appointed for that purpose by the railroad companies whose lines of railway connect with its yard, over whose acts the defendant has no control, whose duty it is to inspect the loads upon cars so received by the defendant, and, if found to be in an unsafe or dangerous condition, the inspector should refuse to accept such car, until the load thereon was properly adjusted by the railroad company delivering it; that, while James A. Tucker was employed as a switchman and car coupler, cars loaded with iron rails were frequently received, and in most cases the ends of the rails extended more or less past the end of the car, and such projection is not an unsafe method of loading, if the extended rails do not come in contact with the next car in the train, which fact Tucker well knew, and he was in the habit of coupling cars with loads in substantially the same condition as the car in question; that such cars can be safely coupled by stooping below the projecting rails, which fact he well knew, and that neither he nor any other car coupler was required to make such coupling, if in his judgment he could not do so with safety; that some of the rails on this car extended over the end, but none more than 24 inches, and in such condition the car was not dangerous, and was accepted by the inspector for the Northern Pacific Railway Co., over whose lines it was to be transported; that when a car approaching the car so loaded had reached a point near enough to be

coupled to it, Tucker stooped to make the coupling, but carelessly and negligently failed to stoop low enough to permit the rails to pass over his head, and when the cars came together he sustained the injury causing his death, which is the same injury and death mentioned in the complaint; that the injury was caused solely by the negligence and want of attention on the part of Tucker, and without any fault or negligence of the defendant. The averments of new matter in the answer having been put in issue by the reply, the plaintiff introduced her testimony and rested, whereupon the court granted a judgment of nonsuit, and she appeals.

The question to be considered is whether the testimony introduced at the trial, aided by presumptions based thereon and deducible inferences, was sufficient to require the submission of the cause to the jury. An examination of the bill of exceptions shows that Tucker, at the time of his death, was twenty-three years old, and for more than a year prior thereto had been employed by the defendant in its yard as a switchman and car coupler; that the defendant owns in Portland, Oregon, a terminal yard, consisting of a series of railway and side tracks, with which are connected lines of railway, operated respectively by the Northern Pacific Railway Co., the Oregon Railway & Navigation Co., and the Southern Pacific Co., and is engaged in receiving into its yard from said railway companies cars which are uncoupled, and when they are returned or hauled over either of the other lines of railway are made up into trains by the defendant's servants; that on July 10, 1899, the defendant received from the Southern Pacific Co. a flat car, 30 feet in length, loaded with iron rails of the same length, which car was to be shipped over the line of the Northern Pacific Railway Co. This car, being out of order when so received, was repaired by the defendant, and set out on one of its side tracks, to be made up into a train for its destination. A flat car, with an automatic coupler, was "kicked" down, to be coupled to the loaded car, which had a common drawhead. No witness was called who saw Tucker when he attempted to make the coupling, so that the manner of his injury is to be

inferred from the circumstances. The side track at the scene of the accident runs north and south, at the west side of which his body was found, with the head crushed. In the patent drawhead a coupling link was found fastened, the other end of which was entered in the common drawhead, the pin in the latter having fallen over, and one of the iron rails, extending over the end of the car 29 inches, came within about three or four inches of an iron cleat surrounding a stake pocket on the end of the car "kicked" down, and blood was discovered upon the end of the projecting rail, and upon this clamp, thus tending to show that the near approach of these blood-marked objects probably caused his death. The testimony also shows that railroad rails shipped on cars usually shift in transit, so that they extend over the end of the car 18 inches or more, and that the only safe way in which a car in this condition can be coupled is by the switchman stooping, so that the rails may pass over his head. The intestate having been killed at about 7 o'clock P. M., before sunset, and at a point where his view of the cars to be coupled was unobstructed, the question is, assuming from a contemplation of the foregoing testimony, which is a fair *resume* of that given at the trial, that the defendant was guilty of negligence in not readjusting the rails, was Tucker also guilty of negligence contributing to his injury, and, if so, was the evidence of his want of care so conclusive that the court could, as a matter of law, take the question from the consideration of the jury?

1. The rule is settled in this state that it is unnecessary for a plaintiff, in a complaint in an action to recover damages for a personal injury, to allege or affirmatively show at the trial that he was free from negligence; but if it should appear from his own proof, offered for the purpose of establishing the defendant's negligence, that he was also guilty of negligence, without which the injury complained of would not have occurred, such proof will defeat a recovery: *Grant v. Baker*, 12 Or. 329 (7 Pac. 318); *Scott v. Oregon Ry. & Nav. Co.* 14 Or. 211 (13 Pac. 98); *Johnston v. Oregon S. L. Ry. Co.* 23 Or. 94 (31 Pac. 283).

2. The defense of contributory negligence is made upon the theory that, notwithstanding the defendant has been guilty of negligence, the person injured has also been guilty thereof, and, as the law will not measure the degrees of wrong where each party is guilty, the plaintiff cannot recover. The answer denies that the defendant was guilty of any negligence, and avers that the intestate's death was caused by his carelessness and want of attention. It is impossible to say from an inspection of the testimony, or from a consideration of the circumstances attending Tucker's death, whether he had been following the flat car that was "kicked" down, or was standing at the loaded car waiting to make the coupling at the instant of contact. If he occupied the latter position, he would undoubtedly have had sufficient time, and, the sun not having set, ample opportunity, to inspect the car near which he was standing, and, having had experience in coupling cars on which the rails had slipped in this manner, he must have known that he could successfully perform the duty required of him only by stooping, so that the rails might pass over his head when he effected the coupling, and, if he failed to bend forward low enough, the fault was his, and necessarily defeats a recovery. It might be inferred, from the fact that the coupling link was found fastened in the automatic coupler, but not pinned in the common drawhead, that Tucker had inserted the link in the approaching car which he was accompanying, and in the hurry incident to the performance of his dangerous work did not see the shifted rails, and was not conscious of his extreme peril until too late to stoop low enough to permit the protruding obstacles to pass over his head. That he was stooping when he sustained the injury is evident from the testimony, which shows that, if he had been standing erect when attempting to make the coupling, the projecting rail would have struck his breast instead of his head. The fact that the coupling link was entered in the common drawhead would seem to refute the inference that he was unconscious of the danger to which he was exposed, for, if he had been following the approaching car until he saw the extended rails, his effort to escape the impend-

ing danger would probably have prevented him from attempting, as he must have done, to enter the link in the common drawhead. Another circumstance that seems irresistibly to lead to the conclusion that Tucker must have thought that he stooped low enough to avoid injury is the fact that the bed of the car loaded with iron rails must have been lower than that of the car to which it was to be coupled, for it will be remembered that his head was injured by being between the iron rail and the stake pocket; and, if the cars had been of the same height, the rails would have passed over the deck of the approaching car, so that he may have reasonably supposed, in the hurry of the work, that, his head being below the end of the car that had been "kicked" back, he was out of all danger. Assuming, without deciding, that the defendant was guilty in not readjusting the load, it would seem that the plaintiff's intestate was also guilty of negligence contributing to his injury, in that he did not stoop low enough.

It may be suggested that it was incumbent upon the jury, and not within the province of the court, to deduce inferences of fact from the circumstances attending the injury, in view of which it is deemed proper to consider the question of Tucker's assumption of the risk, in case any error may have occurred in reaching the conclusion that he was guilty of contributory negligence. The plea of an assumption of risk is a defense in which, if the injury results from a peril ordinarily incident to the employment, the question whether the servant was in the execution of due care at the time he sustained the injury is wholly immaterial: *Northern Cent. Ry. Co. v. Husson*, 101 Pa. 1 (47 Am. Rep. 690). It is not alleged in the answer that plaintiff's intestate assumed the risk that caused his injury, and such averment is unnecessary, if the hazard was ordinary, for the rule of the common law is that when a servant, of suitable age and sufficient intelligence, enters into the employ of the master, he is presumed to understand, and, therefore, in consideration of the rate of compensation agreed to be paid, voluntarily assumes, all the risks ordinarily incident to the business in which he engages (*Johnston v. Oregon*

S. L. Ry. Co. 23 Or. 94, 31 Pac. 283; *Brown v. Oregon Lum. Co.* 24 Or. 315, 33 Pac. 557; *Snow v. Housatanic Ry. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 453, 8 L. R. A. 450, 17 Am. St. Rep. 476; *Wonder v. Baltimore Ry. Co.* 32 Md. 411, 3 Am. Rep. 143); and whenever the law presumes a fact, it is not necessary to aver the same in a pleading: Bliss, Code Plead. (3 ed.) § 175. The rule appears to be otherwise, however, in respect to extraordinary risks, in which case the servant's assumption thereof, to be available as a waiver, must be affirmatively alleged in the answer: *Mayes v. Chicago, R. I. & P. Ry. Co.* 63 Iowa, 562 (14 N. W. 340, 19 N. W. 680); *Fisher v. Central Lead Co.* 156 Mo. 479 (56 S. W. 1107); *Union Stock-Yards v. Goodwin*, 57 Neb. 138 (77 N. W. 357); *Lloyd v. Hanes*, 126 N. C. 359 (35 S. E. 611); *Lee v. Reliance Mills Co.* 21 R. I. 322 (43 Atl. 536). "The waiver of the negligence of the defendant," says Mr. Justice BECK, in *Wells v. Burlington, C. R. & N. Ry. Co.* 56 Iowa, 520 (9 N. W. 364), "places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant there can be no recovery." The servant's assumption of extraordinary risks is a waiver in advance of all claims for damage that may arise in consequence of the master's negligence, and, as a plea of such fact admits a right of action in the servant, but seeks to avoid recovery by reason of the waiver, it seems to be necessary to allege such defense, if relied upon.

The important question to be considered is whether the shifting of iron rails in transit, so that they project beyond the end of the car on which they are loaded, creates an extraordinary risk. "The ordinary risks of a particular business," say Shearman and Redfield in their work on Negligence (5 ed.), § 185, "are those which are part of the natural and ordinary method of conducting that business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business." In *Jackson v. Missouri Pac. Ry. Co.* 104 Mo. 448 (16 S. W. 413), it was held that when a railroad company is in the habit of re-

ceiving and transporting cars laden with timbers and iron rails projecting over the ends of the cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service. Mr. Justice BLACK, speaking for the court, says: "The business of a brakeman is beset with many dangers which are incident to his business, and these risks arising from cars loaded with projecting timbers and rails are risks incident to this particular business, and as to that business are not extraordinary." In *Northern Cent. Ry. Co. v. Husson*, 101 Pa. 1 (47 Am. Rep. 690), a brakeman was killed in coupling cars by having his head crushed between the ends of bridge irons projecting beyond the ends of the cars on which they were loaded, and, it appearing that he was aware of a regulation of the company requiring persons coupling such cars to stoop for that purpose, it was held that the risk run by the brakeman was not extraordinary. In *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188, it was held that where a railroad company is in the habit of receiving cars from other roads loaded with timbers projecting over the ends of the cars, so as to make it dangerous for any one except a careful, skillful, and prudent person to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is made in broad daylight, although it may be raining at the time. In *Boyle v. New York, etc. Ry. Co.* 151 Mass. 102 (23 N. E. 827); the plaintiff's intestate, in attempting to couple cars, had his head crushed by projecting timber, and, the injury having occurred in daylight, it was held that he assumed the risk, and that no recovery could be had.

In *Day v. Toledo, C. S. & D. Ry. Co.* 42 Mich. 523 (4 N. W. 203), a brakeman, in stooping to couple cars, had his fingers injured by the coupling link, caused by lumber projecting beyond the end of the car, and it was held that the injury resulted from one of the risks incident to his occupation, and that no error was committed in taking the case from the jury.

In *Louisville, etc. Ry. Co. v. Gower*, 85 Tenn. 465 (3 S. W. 824), a brakeman, in coupling cars having been injured by lumber projecting beyond the end of the car, brought an action against the railway company for the damages sustained, and it was held that the risk, being necessarily incident to the business of railroad transportation, was assumed by him, and that no recovery could be had. In *Mexican Cent. Ry. Co. v. Shean*, 18 S. W. 151, an experienced switchman, having charge of an engine and its movements, undertook, without objection, to couple a flat car, with its load projecting over the end, to a box car, knowing the dangerous way in which it was loaded, and, having been injured in the performance of his duty, he brought an action to recover the damages sustained, but it was held that he had assumed the risk, and could not recover. For authorities to the effect that a brakeman in coupling cars on which the load projects beyond the end of the car assumes the risk incident to the service, see *Ely v. San Antonio, etc. Ry. Co.* 15 Tex. Civ. App. 511 (40 S. W. 174); *Brennan v. Michigan, etc. Ry. Co.* 93 Mich. 156 (53 N. W. 358); *Toledo, etc. Ry. Co. v. Black*, 88 Ill. 112; *Scott v. Oregon Ry. & Nav. Co.* 14 Or. 211 (13 Pac. 98). The reason upon which the principle rests that material projecting beyond the end of the car is a risk ordinarily incident to the business of a brakeman is thus succinctly put by Mr. Justice SNODGRASS, in *Louisville, etc. Ry. Co. v. Gower*, 85 Tenn. 465 (3 S. W. 824), in which he says: "Lumber of all kinds, iron, steel, and finished structures must often necessarily be transported on cars of shorter length than the material to be transported. It may not be practicable or proper to solidify the train by loading upon connected cars, and it must, of necessity, result that this loading will project, and still the cars require to be coupled. To hold that such a service is not to be anticipated by a railroad employe as an occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines, and their common and well-understood service in conformity to such requirements."

It is contended by plaintiff's counsel that this rule has no application to material which, when carefully loaded, would not extend beyond the end of the car, and that, the car in question being of the same length as the rails which were loaded thereon, no necessity existed for any projection of the rails, and that such extension, caused by the shifting of the rails, was not an ordinary risk incident to the business of coupling cars, and hence the court erred in not submitting the cause to the jury. In *Corbin v. Winona, etc. Ry. Co.* 64 Minn. 185 (66 N. W. 271), a brakeman in the defendant's employ having been killed while coupling cars, one of which was loaded with steel rails that projected over the end of the car due to careless loading or resulting from displacement while in transit, the administrator of his estate brought an action to recover the damages sustained, and, having secured judgment therefor, the company appealed. The evidence showed that the brakeman knew that the rails projected; that he saw the conductor who had charge of the train uncouple the car in question by stooping below the rails, and was cautioned by him to "look out for that car, as the rails stick over;" that the deceased stooped and made the coupling, but raised his head a second too soon, and a trifle too high, whereupon he was immediately pinned against the adjoining car by the extended rail. It also appeared that material of this character often shifted in transit, and when it extended so far as to interfere with the adjoining car its transportation became dangerous, and it was the custom to reload the car or to side track it for that purpose; and that, the conductor having knowledge of the condition of the rails on the car, the company had notice thereof, and it was held that the court could not say as a matter of law that the defendant was not negligent in permitting the car to remain in the train, and that the question of the brakeman's contributory negligence was properly submitted to the jury. Mr. Justice COLLINS, in speaking of the extension of the rails, says: "It is to be remembered that this is not a case where, from the size or shape of the articles carried, they must of necessity project over one or both ends of a car, as will heavy sticks of tim-

ber, or heavy castings, or threshing machines, but it is a case where the load is capable of being placed so that no part of it will extend beyond the deck of the car; and that, if the ends of the rails do project, it is because of careless loading, or is the result of displacement in transit; and, further, that such displacement is not an uncommon occurrence,—in fact, according to defendant's witnesses, it is to be expected. It is also to be noticed that, according to these same witnesses, whenever such material projected so far as to endanger an adjoining car, it was customary to put the rails in place, either by moving them by hand, or by pushing them back, using heavy timbers and a locomotive,—'butting' them, as one witness expressed it." In that case no question of assumption of risk was considered, the decision being put upon the alleged negligence of the defendant and the contributory negligence of the plaintiff's intestate.

In *Scott v. Oregon Ry. & Nav. Co.* 14 Or. 211 (13 Pac. 98), the plaintiff, a brakeman, having been injured in coupling a car loaded with iron rails that extended over the end of the car, secured a judgment against the defendant for the damages sustained, in reversing which Mr. Justice THAYER, in speaking of the plaintiff's employment as an experienced switchman and car coupler, says: "When he engaged in the company's service in that capacity, he assumed all the ordinary risks incident thereto; and, unless the company subjected him to unnecessary danger, it was not liable. This was the gist of the action, and he had no right to have his case submitted to the jury without first proving that the company did subject him to extraordinary risks in the affair, and that his injuries were received as the direct consequence thereof." The decision, however, seems to rest upon the principle of contributory negligence, the majority of the court holding that, as the plaintiff had the right to inspect the car in question, and to refuse to couple it if he found the load thereon dangerous, and not having reported to the foreman in charge of the defendant's yard the condition of the car, he was not free from negligence, nor was the defendant guilty of such negligence as rendered it liable, and that a judgment of nonsuit should have been given. Mr. Chief

Justice LORD, in a dissenting opinion, intimates that the rails having shifted on the car in transit was an unusual occurrence, and created an extraordinary risk.

3. It will be remembered that the defendant is not engaged in operating a line of railway, but in receiving and switching cars, and in coupling them up into trains. The size of its yard, and the length and number of its tracks, are not disclosed by the evidence; and while the care demanded of it in the performance of its business is commensurate with the danger incurred, the same degree of care cannot, upon principle, be required of it as is exacted of a railway company engaged in general transportation business, in which case its trains are moved upon schedule time necessitating hasty coupling and uncoupling of cars at stations, whereby brakemen have not the opportunity for careful observation of the instrumentalities with which they are engaged, nor the time for deliberate action, which switching in a terminal yard affords. In the latter case, the danger incident to coupling cars evidently being less imminent, what might be considered as an extraordinary risk in the coupling of cars at a way station on the line of railroad, where hasty action on the part of the brakeman is demanded, would not be so regarded in coupling cars in a terminal yard. The evidence shows that iron rails shipped on flat cars usually shift in transit, and that a car upon which they have been displaced in this manner can only be coupled safely by the brakeman stooping below the projecting rails and allowing them to pass over his head when the cars come together. The shifting of the rails being usual, the risk incident to coupling cars on which such load has shifted is ordinary, particularly so in a terminal yard. The plaintiff's intestate was an experienced switchman and car coupler, and that he must have seen the protruding rails and been conscious of the danger to which he was exposed is evident from the location of the injury, which conclusively demonstrates that he was stooping, as necessity demanded, when he attempted to make the coupling. We think, as to the service demanded of him, that the risk was ordinary, and one

which he assumed on entering upon the discharge of his duty, and, this being so, no error was committed in granting the nonsuit. It follows that the judgment is affirmed.

AFFIRMED.

Argued 10 February; decided 3 March; rehearing denied 7 April, 1902.

IRVING PARK ASSOCIATION v. WATSON.

[67 Pac. 945; 16 Am. & Eng. Corp. Cas. (N. S.) 320.]

NATURE OF COLLATERAL DEPOSIT OF CORPORATE STOCK.

1. An assignment and delivery of shares of corporate stock by a debtor as security for a debt is usually a pledge, and the instrument here under consideration is a pledge, not a mortgage: *Jacobs v. McCauley*, 8 Or. 124, distinguished.

RIGHT OF STOCKHOLDER TO CONTRIBUTION—EQUITY.

2. A pledgor of a certificate of stock to the corporation by which it was issued, as a security for the unpaid subscription therefor, cannot, when sued for the foreclosure of the pledge, require the balance of the stockholders to be made parties and to contribute to the indebtedness of the company, for the right of the corporation against the pledgor is quite independent of the rights that may exist between stockholders themselves.

FORECLOSURE OF PLEDGE—DEFENSES.

3. Such a pledgor cannot defend by showing that the corporation was organized to purchase land, for which it was supposed that it paid a certain sum, but in fact paid less, as some of the stockholders received commissions and rebates from the owner of the land, for which they ought to account, the matter being wholly between the corporation and such stockholders.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit by the Irving Park Association (a corporation) against Virginia Watson to foreclose an alleged pledge of personal property. The facts are, in substance, that in April, 1890, the defendant and nineteen others contracted for the purchase of 600 acres of land near Portland for the sum of \$130,000, payable \$3,000 down and the balance in installments. To effect and carry out the purchase and the subsequent sale of the land, the plaintiff corporation was organized with a capital stock of \$130,000, divided into 20 shares of \$6,500 each, whereupon the defendant and the other parties interested with her in the purchase subscribed for one share each, and received from the corporation a certificate of stock stating that it was

assessable as follows: \$1,875 on receipt of the certificate, \$1,650 one year from April 28, 1890, \$1,500 and \$1,475 in two and four years thereafter, together with interest on deferred payments at the rate of 7 per cent per annum, payable quarterly, and one twentieth of such taxes as may be assessed against the real estate owned by the association. The land was thereafter purchased and deeded to the corporation, and it executed its note, secured by a mortgage on the property, to the vendor, for the balance due on the purchase price. The plaintiff subsequently levied and collected assessments from its several stockholders amounting in the aggregate to \$100,000, which was applied on its indebtedness. Prior to March 16, 1897, the defendant, as such stockholder, paid all assessments due on her stock except \$1,779.49, and on that day, in consideration of such deferred payment, she made, executed, and delivered to the corporation the following instrument in writing:

“\$1779.49.

Portland, Oregon, March 16, 1897.

Eighteen months after date, without grace, we or either of us promise to pay to the order of the Irving Park Association, at the office of Ladd & Tilton, in this city, the sum of seventeen hundred and seventy-nine and forty-nine hundredths dollars, payable in gold coin of the United States of America, and not otherwise, with interest thereon from December 14, 1896, until paid at the rate of seven (7) per cent per annum, the first payment of interest to fall due on March 31, 1897, and thereafter every three (3) months, and if not so paid, the whole of said note to become due and collectible at the option of the holder thereof, for value received.

And we hereby assign and transfer to the Irving Park Association and deposit with it, as collateral security for the payment of the above promissory note and the expenses that may accrue thereon, the following personal property, of which we are the sole owners, the same being at our own risk and expense, to wit: Certificate numbered 38, for one (1) share of stock in the Irving Park Association, the face value of which is sixty-five hundred dollars.

It is hereby understood and agreed that the said Irving Park Association is not to be held responsible for any injury or loss to said property arising from the act of God, robbery, fire, or flood.

All securities received hereunder may be held and applied by said company to secure said indebtedness or liability of any nature whatsoever, existing, or which may hereafter arise, from us to said Irving Park Association; in view of the non-payment of the said promissory note or the interest thereon when due, we hereby appoint and constitute said company or its treasurer our attorneys in fact, irrevocable with the power of substitution, and we hereby authorize and empower them, or either of them, or their substitute or substitutes, to sell at any time after said promissory note, or any interest thereon, shall become due, at public or private sale, and with notice to us, the whole or any part of the property or collaterals deposited with or held by said company, and to deliver the said property sold to the purchaser or purchasers thereof, and to apply the proceeds of such sale to the payment of said promissory note, with interest and other expenses, together with five (5) per cent commission on sale, and collection of said collateral, and should any suit be brought upon said note, to enforce the collection thereof, to pay all costs of suit and counsel fees incurred therein.

If, after the sale of said property and the application of the proceeds as aforesaid, there should be a balance of indebtedness still unpaid, we hereby promise to pay on demand such balance in gold coin to said company; but in case said promissory note and all other indebtedness to said Irving Park Association be paid, with interest and other expenses, as above stipulated, then this agreement shall be void, and all property held as security shall be returned to us; and all provisions of law providing for sale of pledges are hereby expressly waived. Should any such sale be made, said attorneys in fact, or either of them, directly or in the name of any other person, shall have the right to purchase.

Witness our hands and seals this March 16, 1897,

VIRGINIA WATSON, [SEAL.]”

Default having been made in the payment of the amount due, the plaintiff commenced this suit to foreclose its lien upon the certificate of stock so assigned and delivered to it as collateral security. The complaint is in the usual form, and the answer sets up several defenses: (1) That a court of equity has no jurisdiction, and that plaintiff's remedy is by sale of the certificate of stock in the manner provided in the instru-

ment of writing referred to; (2) that the balance of \$30,000 still due from the plaintiff on the land purchased by it is owing by the defendant and five other subscribers to the stock of plaintiff, who are each wholly insolvent and unable to pay any part thereof; that fourteen of the remaining stockholders are solvent, and able to contribute their share to the payment of said indebtedness; and the answer therefore prays that they be made parties to the suit, and required to contribute their proportionate share of such indebtedness; and (3) that \$90,000, and not \$130,000, was the true purchase price of the land, and the difference of \$40,000 was, without the knowledge of the defendant, charged and received as rebates and commissions from the owner of the land by some of the other stockholders, who should be made parties to this suit, and required by a decree to account to the corporation for the sums so received by them. A demurrer was sustained to the answer, and, defendant declining to plead further, a decree was entered in favor of the plaintiff as prayed for in the complaint, from which the defendant appeals. **AFFIRMED.**

For appellant there was an oral argument by *Mr. Benjamin B. Beekman*, with a brief over the names of *Watson & Beekman*, and *Robert G. Morrow*, to this effect:

The instrument sued on assigns and transfers the certificate of stock as a security for the debt, and provides with great particularity for a sale and an application of the proceeds towards the satisfaction of the debt without suit.

A transfer of personal property as mere security for a debt, no matter in what form or by what instrument, is a chattel mortgage, and gives no other rights or remedies than the law allows to mortgagees of chattels: *Jones*, Chat. Mtgs. (3 ed.) §§ 4 and 5; 5 Am. & Eng. Ency. Law (2 ed.), 947, and note 3; *Millhiser v. Pleasants*, 118 N. C. 237 (23 S. E. 969-970); *Graham v. Blinn*, 3 Wyo. 746 (30 Pac. 446); *Campbell v. Woodstock*, 83 Ala. 351 (3 So. 369-370); *Carpenter v. Snelling*, 97 Mass. 452; *Taber v. Hamlin*, 97 Mass. 93; *Smith v. 49*, etc.

Min. Co. 14 Cal. 242; *Cooper v. Brock*, 41 Mich. 488; *Langdon v. Buel*, 9 Wend. 79, 83; *Atwater v. Mower*, 10 Vt. 75; *Frankhouser v. Fisher*, 54 Kan. 738; *Read v. Horner*, 90 Mich. 152 (51 N. W. 207); *Woodward v. Crump*, 95 Tenn. 369; *Barrow v. Paxton*, 5 Johns. 258 (4 Am. Dec. 354).

Provisions for the sale of personal property and the application of the proceeds towards the satisfaction of the debt secured, incorporated in a chattel mortgage, exclude the jurisdiction of courts of equity to entertain foreclosure proceedings, under the laws of this state: Hill's Ann. Laws, § 3838; *Jacobs v. McCalley*, 8 Or. 124.

On Motion for Rehearing.

Mr. B. B. Beekman, for the motion, urged these points:

The text writers cited in the opinion of the court favor the construction therein adopted on account of the inherent difficulty of mortgaging shares of stock, and base their views, not upon the character of the instrument by which the security is effected, but solely upon the nature of the personal property given as security for the debt. Shares of stock, though somewhat intangible in their nature, are personal property, and there is nothing in their intrinsic character to prevent a mortgage of them by a proper instrument evidencing such intention. In *Hembree v. Blackburn*, 16 Or. 153, 156 (19 Pac. 73), a similar instrument was construed to be a chattel mortgage. There as here the instrument contains all the attributes of a chattel mortgage, and the only material difference lies in the fact that the instrument there construed covered ordinary goods and chattels, while the present instrument embraces shares of stock.

That shares of stock may be the subject of a chattel mortgage, we cite the following in addition to the numerous authorities cited in appellant's brief: Cook, Stock and Stockh, § 464; 5 Am. & Eng. Ency. of Law (2 ed.), 975, and cases cited in notes 3 and 4; *Megear v. Etiwanda Water Co.* 76 Cal. 537 (9 Am. St. Rep. 245).

At common law all forms of personal property could be mortgaged, and, in the absence of statutory limitation upon the forms of property that may be mortgaged, any transfer of any personal property as security for debt should be construed to be a chattel mortgage, if so intended by the parties thereto, and such intention is to be ascertained, in the first instance, from the form and nature of the instrument by which the security is effected. The instrument in litigation shows such intention. The nature of the personal property covered should not be permitted to defeat that intention. The logical effect of the construction adopted by the court is that shares of stock, on account of their peculiar nature, cannot be mortgaged, though the instrument of transfer may have all the attributes, both in form and substance, of a chattel mortgage, and clearly evidences an intention to mortgage the same.

For respondent there was an oral argument by *Mr. Wm. Torbert Muir*, with a brief over the name of *Fenton & Muir*, to this effect:

A court of equity has jurisdiction to decree a sale of personal property pledged as security: *Hill's Code*, § 414; *Thompson v. Marshall*, 21 Or. 171, 177-179 (27 Pac. 957); 2 *Daniel, Neg. Instr.* (3 ed.) § 833; *Boynton v. Payrow*, 67 Me. 587; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Strong v. National Mech. Bkg. Assoc.* 45 N. Y. 718-720.

In some cases it is held that the remedy of the pledgee of negotiable paper is an action at law to enforce the obligation. This doctrine is not applied to stocks deposited as collateral: 2 *Daniel, Neg. Instr.* (3 ed.) § 833.

An agreement between pledgor and pledgee that collateral may be sold summarily upon default, does not exclude a sale by judicial decree: 1 *Hill's Code*, §§ 414, 422; *Thompson v. Marshall*, 21 Or. 170-177 (21 Pac. 957); *Coffin v. Chicago, etc. Co.* 67 Barb. 337-339.

Fraud or mismanagement of directors or the payment of excessive prices for property purchased is no defense to a subscription for stock: 1 *Cook, Corp.* (4 ed.) § 188; *People v. Bar-*

rett, 91 Ill. 422-423, 431-432; *Chetlain v. Republic, etc. Co.* 86 Ill. 220, 221; *Merrill v. Reaver*, 50 Iowa, 404; *Cook v. Hopkinsville, etc. Co.* 32 S. W. 748; *Hards v. Platt, etc. Co.* 46 Neb. 709; *Hornaday v. Indiana, etc. Co.* 9 Ind. 263.

MR. CHIEF JUSTICE BEAN, after stating the facts as above, delivered the opinion of the court.

1. The first contention for the defendant is that the instrument sought to be foreclosed is a chattel mortgage, and under Act 1866, p. 688, § 2 (Section 3838, Hill's Ann. Laws), as interpreted in *Jacobs v. McCalley*, 8 Or. 124, can be foreclosed only in the manner stipulated, since plaintiff has possession of the property; while for the plaintiff the contention is that the transaction was a pledge, and not a mortgage. Speaking generally, the distinction between a mortgage and pledge of personal property is that in the former the thing pledged must be delivered to the pledgee, while in the latter the possession may remain with the mortgagor. It is often difficult to determine whether a given transaction is a mortgage or a pledge when possession of the property is delivered to the creditor. But the general rule is that an assignment and transfer of shares of stock in a corporation by a debtor as security for a debt is a pledge, and not a mortgage. Indeed, it is said by Mr. Cook that "it is difficult to ascertain from the cases how shares of stock may be mortgaged; and a few early decisions, which held certain transactions to be mortgages, would to-day be held to be pledges": *Cook, Stock and Stockh.*, § 464. Mr. Edwards, in his work on Bailments (2 ed.), § 219, says: "Shares of stock in a corporation are now, and have been for many years, habitually pledged as collateral security for money loaned. The pledge is made by a direct transfer of the scrip in writing, with an authority to effect a transfer in due form on the books of the corporation; and in his note for the sum loaned the borrower further authorizes the pledgee to sell the stock. The effect of the transaction is not a mortgage, but a pledge of the stock to secure the prompt payment of the money borrowed. On account of its incorporeal nature, property in stocks cannot

be otherwise delivered. The delivery of the scrip alone is not considered sufficient, because it does not of itself enable the pledgee to sell the stock and apply the proceeds to pay the debt. * * The contract of pledge is entirely consistent with the owner's right as a stockholder. Until the pledge is rendered available by a foreclosure, he remains a member of the corporate body, interested in its management." And Mr. Jones, in his work on Pledges (section 153), says that the transfer of the legal title to the stock to the pledgee is not inconsistent with the existence of a pledge, but, on the contrary, it cannot generally be pledged without a written transfer of the title, because it is not capable of manual delivery; and "in general it may be said that any transfer as collateral security of shares in a corporation, made in the ordinary form of an indorsement of a certificate, or by delivery of it with a power of attorney to make a transfer upon the books of the corporation, or by an actual transfer upon the books, is a pledge, and not a mortgage; and it is immaterial in this respect whether such transfer appear to be absolute or is expressed to be made as security." Within these authorities we think the transaction between the plaintiff and the defendant as set out in the pleadings constituted a mere pledge of the stock, coupled with a right to sell it in case of default; and such a construction was given by this court to practically a similar transaction in *State ex rel. v. Smith*, 15 Or. 98 (14 Pac. 814, 15 Pac. 137, 386).

2. The other questions require but a brief notice. The defendant is sued upon a written contract or agreement for the payment of money secured by the deposit of her stock as collateral security. Upon this contract the plaintiff has a right to maintain a suit without regard to the solvency or insolvency of the other stockholders, and there is no right of contribution between stockholders which can be enforced therein.

3. The other matter is a question between the corporation and the stockholders. If there is a right of action against them to recover the money which it is alleged they received as commission or rebates from the vendor of the land, it rests in the corporation, and cannot be the subject of adjudication in a

suit to enforce payment of an indebtedness from the defendant to it. From these views it follows that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 4 March; decided 31 March, 1902; rehearing denied.

HUBER v. MILLER.

[68 Pac. 400; 54 Cent. L. Jour. 429.]

41	108
41	143
41	304
41	508
41	103
45	453

TRIAL—MOTION FOR NONSUIT—PROVINCE OF JURY.

1. The jury being the judges of the facts, the court should not decline to submit a case if the plaintiff's testimony tends, even remotely, to support the allegations of the complaint. In this instance the case was properly sent to the jury, though the plaintiff's testimony was somewhat confused.

TRIAL—DIRECTING VERDICT FOR DEFENDANT.

2. If a verdict is directed in favor of defendant it precludes another action for the same cause, which is not the case where a motion is allowed to take the case from the jury for insufficiency of plaintiff's evidence. In some cases the courts are justified in directing a verdict for the defendant after all the evidence has been submitted, but there must have been more of a defense than a contradiction of the plaintiff's case—to direct a verdict on a mere contradiction would be to determine the weight of the evidence, which a judge has no right to do.

MISCONDUCT OF COUNSEL IN ARGUMENT.*

3. Where there was evidence tending to show that defendant and his partner were allied in some manner with the makers of the notes upon which plaintiff's action was brought, and that all were engaged in a common purpose to obtain money on the credit of irresponsible parties, it was not an unwarranted abuse of privilege for counsel to designate defendant and his partner as vultures and wolves, and as fit subjects for the penitentiary, and by permitting such invective the court did not so abuse its discretion in regard to control of counsel and their arguments as to warrant a reversal of a judgment in favor of plaintiff.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by J. M. Huber against C. W. Miller. From a judgment in favor of plaintiff, defendant appeals. **AFFIRMED.**

For appellant there was an oral argument by *Messrs. Lionel R. Webster* and *Nathaniel H. Bloomfield*, with a brief to this effect:

*NOTE.—This case is rereported in 54 Cent. Law Jour. 429, with a note collecting many cases on the subject of Remarks of Counsel as Reversible Error. See, also, Remarks of Counsel as Reversible Error in Civil Cases, in 53 Cent. Law Jour. 85, and extensive note, Misconduct of Counsel in Argument, 9 Am. St. Rep. at p. 559.—REPORTER.

I. There was no evidence to show that any money was loaned by Huber to Miller, and the motion for a nonsuit should have been granted: *Brown v. Oregon Lum. Co.* 24 Or. 315 (33 Pac. 557); *Serles v. Serles*, 35 Or. 289 (57 Pac. 634); *Hill's Ann. Laws*, §§ 246, 247.

II. The evidence affirmatively showed that no money was loaned by Huber to Miller, and therefore defendant's request for a direction to the jury to find in his favor should have been granted.

III. The court erred in its refusal to restrain counsel for respondent from vilifying and abusing appellant and his witnesses, in his address to the jury, in refusing to expunge this vilification and abuse after it had been uttered, and in refusing to protect appellant therefrom and instruct the jury to disregard it: *Tucker v. Hennicker*, 41 N. H. 317; *People v. Ah Len*, 92 Cal. 282 (27 Am. St. Rep. 103); *Fletcher v. State*, 49 Ind. 124 (19 Am. Rep. 673); *School Town of Rochester v. Shaw*, 100 Ind. 268; *Berry v. State*, 10 Ga. 522; *Cleveland Paper Co. v. Banks*, 15 Neb. 20 (48 Am. Rep. 334, with note, 16 N. W. 833); *Tillery v. State*, 24 Tex. App. 251 (5 Am. St. Rep. 882); *Randolph v. Landwerlen*, 92 Ind. 34; *McDonald v. People*, 126 Ill. 150 (9 Am. St. Rep. 547, 18 N. E. 817); *Brown v. Swineford*, 44 Wis. 282 (28 Am. St. Rep. 582); *Bullard v. Boston & M. Ry. Co.* 64 N. H. 27 (10 Am. St. Rep. 367, and note); *Hatch v. State*, 8 Tex. App. 416 (34 Am. Rep. 751); *Coble v. Coble*, 79 N. C. 589 (28 Am. Rep. 338); *Perkins v. Burley*, 64 N. H. 524; *Martin v. State*, 63 Miss. 505 (56 Am. Rep. 812, with note); *Bessette v. State*, 101 Ind. 85; *Tenny v. Mulvaney*, 8 Or. 522; *State v. Anderson*, 10 Or. 456; *State v. Drake*, 11 Or. 399; *State v. Olds*, 19 Or. 397, 434 (24 Pac. 395); *State v. Foot You*, 24 Or. 70.

For respondent there was an oral argument by *Mr. Henry E. McGinn*, with a brief to this effect:

I. Two trials of this case have resulted in verdicts for the full amount demanded, and it is confidently submitted that it must be a very extraordinary case indeed in which an appellate

court can be induced to grant a second new trial on a simple matter of fact: *Clerk v. Udal*, 2 Salkeld's, 649 (1702); *Chambers v. Robinson*, 2 Strange, 691, 692 (1725); *Goodwin v. Gibbons*, 4 Burrows, 2108; *Swinnerton v. Marquis of Stafford*, 3 Taunt. 232; *Joyce v. Charleston Ice Mfg. Co.* 50 Fed. 371, 375; *Hill v. Smith*, 32 Cal. 166; *Milliken v. Ross*, 9 Fed. 855; *Willis v. Bucher*, 2 Binn. 467; *Keble v. Arthurs*, 3 Binn. 25, 28; *Berks County v. Ross*, 3 Binn. 520, 526; *Archer v. New York & H. R. R. Co.* 106 N. Y. 589, 601; *Peacocke v. Maucke*, 42 Ind. 478; *Todd v. Demerec*, 15 Colo. 89; *Pensacola & G. R. Co. v. Nash*, 12 Fla. 497, 511; *Wood v. Hildreth*, 73 Ill. 525; *Cole v. Fall Brook Coal Co.* 87 Hun, 584; *Bennett v. Runyon*, 4 Dana (Ky.), 422; *City & Suburban R. Co. v. Waldhaur*, 84 Ga. 706; *Davis v. Smith*, 30 Ga. 263; *Duggan v. Cole*, 2 Tex. 381, 396; *Howitt v. Estelle*, 92 Ill. 218; *Griffin v. Kehrner*, 24 Ill. App. 243, 245; *Osborn v. Miner*, 46 Ill. App. 133; *Graham v. Sadlier*, 60 Ill. App. 522; *Fowler v. Aetna Fire Ins. Co.* 7 Wend. 270, 275; *Barrett v. Rogers*, 7 Mass. 297, 300; *Turner v. Bird*, 44 Miss. 449; *Steadman v. Wilher*, 7 R. I. 481, 489; *Van Blarcom v. Kip*, 26 N. J. Law, 351, 360.

II. An appellate court, when there has been a request made in the court below to direct a verdict and an exception taken to a refusal of the trial court to so direct, will look into the evidence far enough to determine whether there was any evidence. When there is evidence, though slight, a verdict will not be disturbed. The reason is obvious; a total want of evidence upon some essential fact renders the error of the trial court one of law; but when there is some evidence, for an appellate court to attempt the correction thereof upon a writ of error would be but a correction of error in fact, and not in *Caesar*, 15 Or. 62, 68 (13 Pac. 652).

law, a power which this court does not possess: *McBee v. Ceasar*, 15 Or. 62, 68 (13 Pac. 652); *Hardwick v. State Ins. Co.* 23 Or. 291, 293 (31 Pac. 656); *Sperry v. Wesco*, 26 Or. 483, 494 (38 Pac. 623); *Voorhis v. Terhune*, 50 N. J. Law, 147, 159 (7 Am. St. Rep. 781, note); *Conely v. McDonald*, 40 Mich. 150, 159; *Westcott v. New York & N. E. R. Co.* 152 Mass. 465,

467; *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 91; *Erie Railroad v. Winters*, 143 U. S. 60, 75; *Walker v. Bailey*, 65 Me. 354, 359; *Alexander Dye Works v. Ronfousse*, 57 N. J. Law, 700; *Chidester v. Yard*, 155 Pa. 483, 489; *Bartlett v. Kingan*, 19 Pa. 341, 343; *Cooper v. Perry*, 16 Colo. 436, 437; *Lisbon v. Bath*, 23 N. H. 1, 10; *Jackson v. Harby*, 70 Tex. 410, 416; *Leonard v. Barnett*, 70 Ind. 367, 372; *Grant v. Westfall*, 57 Ind. 121, 127; *Hall v. Huse*, 10 Mass. 39, 42; *Heywood v. Stiles*, 124 Mass. 275; *Forsyth v. Hooper*, 93 Mass. (11 Allen) 419; *Ward v. New Eng. Fibre Co.* 154 Mass. 419; *Cruger v. Clark*, 44 Ga. 224, 226; *Pulliam v. Ogle*, 27 Ill. 189; *Best Brew. Co. v. Dunlery*, 57 Ill. App. 96; *Scannell v. Strahle*, 9 Cal. 177; *McKillop v. Duluth St. Ry. Co.* 57 Minn. 408; *Brockman v. Berryhill*, 16 Iowa, 183, 184; *Schermer v. Gendt*, 52 Iowa, 742; *Capelle v. Brainard*, 52 Mo. 479; *Trowbridge v. Baker*, 1 Cow. 251, 252; *Whitcomb v. Thomas*, 47 Neb. 909; *Gafford v. Hall*, 39 Kan. 166; *Smith v. Tiffany*, 36 Barb. 23, 25, 26; *Knickerbocker v. Anderson*, 31 N. J. Law, 333; *Hill v. New Haven*, 37 Vt. 501, 509 (88 Am. Dec. 613); *Williams v. Town of Clinton*, 28 Conn. 264, 266.

III. Just, even fierce, invective, when based upon the facts in evidence, and all legitimate inferences therefrom, is not discountenanced by the courts: 2 Ency. Pl. & Pr. 747; *Tucker v. Henniker*, 41 N. H. 317, 322; *Cawfield v. Asheville St. Ry. Co.* 111 N. C. 597, 598 (where the expression "whore-house pimp" was held justified by the evidence); *Goodman v. Sapp*, 102 N. C. 477, 481; *George v. Swafford Bros.* 75 Iowa, 491, 496; *People v. Winslow*, 39 Mich. 505, 507 (opinion by COOLEY, Judge, where the court refused to set aside verdict for use during closing argument of the following expression: "They are the lowest of the low deadbeats"): *People v. Perriman*, 72 Mich. 184, 190 (where "professional bigamist" was sustained); *Snodgrass v. Commonwealth*, 89 Va. 679, 685 (the expression "defendant's fiendishness" was held justified by the evidence); *State v. Shawn*, 40 W. Va. 1 (where "steeped in crime" and other similar remarks were held not to be abuse of legitimate discussion); *Burton v. O'Neill*, 6 Tex. Civ. App.

613, 617; *Hickey v. Behrens*, 75 Tex. 488, 491 (where the conduct of one of the parties is spoken of as a "colossal rascality"); *House v. State*, 19 Tex. App. 227 (where speaking of the defendant in a criminal case, it was said a more notorious character could not be found); *Pierson v. State*, 18 Tex. App. 524, 564; *McConnell v. State*, 22 Tex. App. 354, 369; *Anderson v. State*, 104 Ind. 467, 475; *Fertig v. State*, 100 Wis. 301, 307 (a strong and well considered case from which we have made citations *in extenso* later on in this brief).

This is an action to recover money alleged to have been loaned to defendant. The complaint contains two counts. By the first it is alleged that the plaintiff, on September 7, 1892, at the instance of defendant, advanced and loaned to him \$1,000, which he agreed to repay in six months, with interest at the rate of 10 per cent per annum, of which \$375, as interest, has been paid, and no more. By the second count it is alleged that plaintiff advanced to defendant a like sum on October 14, 1892, which defendant agreed to repay in one year, with interest at 10 per cent per annum; that no part of the principal has been paid, and but \$145 as interest. The answer consists in denials only. The trial was had before a jury, which resulted in a verdict for plaintiff, and the defendant appeals.

MR. JUSTICE WOLVERTON delivered the opinion.

Three questions are raised by the record upon which the defendant relies for reversal of the judgment. The first has relation to a motion for a nonsuit, made at the close of plaintiff's evidence; the second to a motion to direct a verdict for defendant; and the third has reference to the argument of plaintiff's counsel to the jury, wherein, it is asserted, he was permitted, over objection, to go outside of the evidence adduced, and to resort to personal invective and abuse prejudicial to defendant's case. These matters will be considered in their order.

1. The plaintiff, as a witness in his own behalf, testified, in effect, that he became acquainted with the defendant some time prior to the negotiations alluded to in the complaint; that their

relations were friendly and confidential; that he had been led to trust the defendant as a brother, and had great confidence in his business capacity and integrity; that some time prior to the first alleged loan the defendant importuned him to loan Schindler money upon some furniture in the Grand Central Hotel, then to take stock or invest in a building and loan association, and later requested him to make a loan to another party, all of which he declined; that finally the defendant offered to take the money himself upon his own responsibility, and that thereupon, on the 7th day of September, 1892, the plaintiff advanced \$1,000 to him, with the agreement that he pay plaintiff 10 per cent per annum thereon, and return the principal in about 30 days. He further testified, in substance, that defendant wanted him to loan money to a corporation known as Home Builders, and to J. D. Cook and C. E. Howland, managers of the concern, but that, being unacquainted with these people, or their financial condition, or that of the Home Builders, he declined to extend them credit, and that thereon the defendant again agreed to take the amount of money desired upon his own responsibility, and to pay plaintiff for the use thereof 10 per cent per annum; and that the second \$1,000 was advanced under that arrangement, and none other.

The plaintiff, under pressure of cross-examination, asserted and reasserted, with apparent consistency, that such were the real transactions concerning the loaning of the two sums of money, but there was much elicited having a strong tendency to discredit and impeach his statements. To illustrate, the records show that on the day he claims to have made the first loan to Miller, of \$1,000, the plaintiff drew his check for the identical sum in favor of a third party, who executed a note for a like sum, payable to plaintiff six months after date, with interest at 10 per cent per annum. So, with the second alleged loan, it appears that, on the day it is alleged to have been made, the Home Builders executed a note to plaintiff for the sum of \$400, and the Home Builders and Cook and Howland executed another payable to plaintiff for \$600, and at the same time

plaintiff drew his check payable to the Home Builders for \$1,000. It further appears, however, that these notes and certain securities, which are alleged to have been turned over as collateral, never actually came into the hands of the plaintiff, but were left with the defendant,—whether by the plaintiff or not, or with his authority, is a disputed question,—and remained in his custody up to the time of the institution of the action, and were offered in evidence by him at the trial. There were also produced, during plaintiff's examination, numerous letters written by him containing apparent admissions that persons other than defendant are his debtors. Plaintiff, however, attempts to explain all these matters by asserting that he was misled by the defendant, and that it was at his particular request he was induced to write to these parties, and endeavor to collect from them, while insisting at the same time upon defendant's liability and obligation to pay under the agreements set out in the complaint. There is also another feature of the testimony susceptible of a different construction. The plaintiff received payments as interest from time to time beyond the legal rate. For instance, at the end of six months he received a check from the Home Builders for \$60, and at the end of the year received another check for the same sum, or 12 per cent per annum. He also received from another, through Miller, interest at the rate of \$10 per month for six months, and perhaps other payments direct. Touching this feature, the plaintiff testified that he told Miller the taking of \$10 per month was 12 per cent per annum interest, indicating that it was usurious, but that defendant assured him it was all right; that he would fix that. Nevertheless, the plaintiff insisted that defendant should keep the excess of interest, which he apparently did not do. That there was an arrangement of some kind to take an unlawful rate is evidenced by a letter written by the defendant to plaintiff on April 29, 1895, wherein he says: "Mr. — — — agreed to pay \$10 per month interest on this money, and, of course, this was an illegal rate, and I could not indorse the same on the note for that reason. Had this indorsement been put upon the note, your note would

not be of any value to you." The evidence being very voluminous, it is impossible to examine it in detail. These references, however, will suffice to indicate in a general way the trend thereof up to the time plaintiff rested his case, and we are agreed that there was sufficient to carry the same to the jury upon plaintiff's cause as set out; that is, that these loans were made by him direct to the defendant with an agreement on his part to repay them with interest at 10 per cent per annum. The fact that an arrangement probably existed whereby the plaintiff was to obtain an unlawful rate of interest, and that the notes referred to evidence a promise to pay 10 per cent only, would indicate, in some measure, that the written contracts were not the real ones attending the transactions, and, the whole testimony considered, there is a susceptibility of reasonable inference and deduction that plaintiff is right in his contention, so that the matter was properly submitted to the jury for their determination.

2. The second question is cognate to the first, and is governed by the same principle. The practice of directing verdicts has obtained in this jurisdiction, and we may say generally: *Prof-fatt, Juries*, § 351; *Way v. Illinois Cent. R. Co.* 35 Iowa, 585; and *Cutler v. Hurlbut*, 29 Wis. 152, 165. The result differs from an involuntary nonsuit, in that it effectually concludes the controversy, and thus precludes another action. "It is scarcely necessary," says Mr. Thompson, in his work on Trials (section 2268), "to recall the principle that a nonsuit cannot be granted, or a peremptory instruction for the defendant given, where there is evidence tending to show a right of recovery in the plaintiff, although the court may believe that the weight of evidence is with the defendant; or, to state it more loosely, though in language which is found in judicial opinions, where, from the evidence, the jury may properly find a verdict for the plaintiff." The case of *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120, is illustrative. A motion was there made, as here, to direct the jury to return a verdict for the defendant. The court say: "Without entering upon any analysis of the evidence, it is sufficient to say it was of that character the

court would not have been justified in withdrawing the case from the jury, or, what is the same thing, instructing the jury to find for the defendant. * * Asking an instruction to withdraw a case from the jury is, in effect, the equivalent of a demurrer to the evidence. A demurrer to the evidence is understood to admit everything it tends to prove. Applying that principle to this case, and admitting all the testimony tends to prove, this court has no hesitation in saying it is not a case that ought to have been taken from the jury, or where the jury should have been instructed to find for defendant." So in *Re Kipp's Estate*, Deceased, 63 Mich. 79 (29 N. W. 517, 518), where the court was requested to direct a verdict for the defendant, it was said: "There was some testimony in the case from which inferences might be drawn proper to charge the estate, and the court could not pass upon that." And again, it was held by the court of appeals of Kansas, Southern Department (*St. Louis & S. F. R. Co. v. Toomey*, 49 Pac. 819), that "a jury should not be directed to return a verdict for the defendant when, in the judgment of the trial court, plaintiff, according to the rules of evidence, has produced sufficient testimony—admitting its truth, and drawing from it all the inferences that can reasonably be drawn from it—that the jury might reasonably find a verdict for the plaintiff." It is manifest, therefore, that a motion at the close of the case to direct a verdict for the defendant, intended simply to defeat the plaintiff's action, and not to secure affirmative relief, gives rise to the identical inquiry as does a motion for nonsuit. What the inquiry is upon a motion for nonsuit has so often been determined by this court, and is so well understood, that it would be a work of supererogation to attempt to restate it at this time. There are cases where, no doubt, it would be proper to grant a motion to direct a verdict at the close of the case, when it or a nonsuit would not be allowed at the close of the plaintiff's testimony; but where the testimony of the parties litigant is merely conflicting and contradictory, the plaintiff having made a case in the first instance sufficient to entitle him to go to the jury, it is not within the province of the court to take it away later.

Employing the language of Mr. Justice SCHOFIELD in *Frazer v. Howe*, 106 Ill. 563, 574: "It is not within the province of the judge, on such a motion, to weigh the evidence and ascertain where the preponderance is. This function is limited strictly to determining whether there is, or is not, evidence legally tending to prove the fact affirmed; *i. e.*, evidence from which, if credited, it may reasonably be inferred, in legal contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence." In *Spensley v. Lancashire Ins. Co.* 54 Wis. 433 (11 N. W. 894), there was a motion for a nonsuit at the close of the plaintiff's testimony, and another at the close of the case. The issue was single, and was whether the injury plaintiff had sustained was caused by lightning. The latter motion was sustained by the trial court, and on that account the case was appealed. Speaking of the question thus raised, Mr. Justice CASSODAY says: "The simple question is whether the evidence in behalf of the plaintiff, had it remained undisputed, and giving to it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to justify a verdict in favor of the plaintiff. In other words, is there evidence, when so construed, tending to prove that lightning was an agency in the destruction of the plaintiff's building, within the meaning of the policy?" The fact that the defendant has produced evidence in direct conflict with that of plaintiff does not change the legal question, and it remains yet to be determined whether there has been any evidence adduced legally tending to prove the fact affirmed; that is to say, evidence from which it may be legitimately inferred by the application of intelligent and reasonable deduction, ascribing thereto absolute credence. The court can have nothing to do with the credibility of witnesses or inferences to be drawn from facts proven and other matters of kindred nature which go to make up the weight of evidence; and, whenever it becomes necessary to call into requisition this method of deduction in the determination of a controversy touching a fact or facts, the jury, and not the court, must dispose of it. This court has said, in *Herbert*

v. *Dufur*, 23 Or. 462, 466 (32 Pac. 302): If there is a fair conflict of evidence arising from contradictory testimony, or if the inferences to be drawn from the testimony are conflicting, or if the witnesses are neither indifferent to the result nor consistent in their statements, so that there is a question as to the credit to be given them, the case must go to the jury." In further support of this view of the law, see *McQuown v. Thompson*, 5 Colo. App. 466 (39 Pac. 68); *Bartelott v. International Bank*, 119 Ill. 259 (9 N. E. 898); *Reed v. Inhabitants of Deerfield*, 8 Allen, 522; *Cooper v. Waldron*, 50 Me. 80; *Randall v. Baltimore & Ohio R. Co.* 109 U. S. 478 (3 Sup. Ct. 322); *Brooks v. Inhabitants of Somerville*, 106 Mass. 271.

This should suffice to dispose of the question, but it is insisted that the motion should be considered upon like principle as a motion to set aside a verdict or for a new trial, in which case the trial court is permitted to consider the weight of the evidence and pass upon its sufficiency in point of fact. The legal distinction between the two proceedings was pointed out in *Serles v. Serles*, 35 Or. 289 (57 Pac. 634). This court can only deal with the evidence in a proper proceeding for a determination of its sufficiency in point of law. The trial court may determine its sufficiency in point of fact, error not being assignable as to the latter: *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537). Considering the question, therefore, of the legal sufficiency of the testimony as presented by the motion to instruct, not by that to set aside the verdict, we find several witnesses were produced, who flatly contradicted the plaintiff upon the direct and vital point in issue; but this was effective only to produce a conflict in the testimony, and the jury were at liberty to believe the plaintiff as against several, if his testimony produced conviction in their minds. Indeed, there is an express provision of the statute requiring the court to instruct the jury "that they are not bound to find in conformity with the declarations of any number of witnesses, against a less number, or a presumption or other evidence satisfying their minds": Hill's Ann. Laws, § 845, subd. 2. The

question is purely one as to the sufficiency of the evidence in point of law, and we are precluded, as we have seen, from reviewing the findings of the jury, or the action of the trial court respecting them, which in this case set aside one verdict, but refused to do so the second time,—a persuasive circumstance in favor of a present termination of the controversy: *Buencmann v. St. Paul, Minn. & M. Ry. Co.* 32 Minn. 390, 393 (20 N. W. 379); *Duggan v. Cole*, 2 Tex. 381, 396; *Cole v. Fall Brook Coal Co.* 87 Hun, 584 (34 N. Y. Supp. 572).

3. As to the third contention, it is urged with especial emphasis that counsel for plaintiff, in his argument to the jury, was permitted to go outside of the testimony, and to resort to personal abuse and vilification to an unwarranted degree, and that the case should be reversed on that account, if for no other. The most severe of the remarks alluded to are as follows: "Now, if there were ever two bunco men in the State of Oregon, those two men are Miller and Miller." "A bunco man goes down ordinarily and meets a man at the train. He takes the man up town, gains his confidence, and then takes him into a room and introduces him to a friend of his, another man, and that man fleeces him out of his money. According to the testimony of these people, that is about the basis these men acted upon." "You can take the testimony of C. W. Miller. It was that Elmer Miller went to work and took this man into the office of ———, and left ——— to do the work. Put their construction upon it. That is the testimony of Elmer Miller,—he took him to ——— office to have ——— fleece him there." "Miller, I say, in regard to your oath of office, you led that man along and you worked him; you worked him with the Grand Army racket; you worked upon the poor old man's sympathy; you worked upon him until you filched from him his money; and I want the promise you made to him to be kept good. I want you to be held to your promise."

"We tried a bunco man the other day in the criminal department of this court, but what that man did was a trifle compared with C. W. Miller, the man who bilked this old man out of his money. * * 'In the start who caused it to be done?'

The Millers, the Cooks, and the Howlands, who preyed like vultures and wolves upon this community for four or five years; who, if they had their honest deserts, would be in the penitentiary."

It is the privilege of the counsel in argument to comment upon the evidence and facts proven, and to draw all legitimate inferences therefrom. In this the law accords to him a large degree of freedom, and the means thus accorded is justly regarded as most efficient in arriving at the truth. The latitude or range of argument, however, cannot be permitted to extend beyond the facts in evidence, and it is a just and ample cause for reversal where counsel, against objections, are notwithstanding allowed to state facts pertinent to the issues not in evidence, or to assume in argument that such facts are in the case. The jurors are triers of fact upon the evidence adduced, which is scrutinized in its admission by the court, and they must exclude extraneous matters from consideration in arriving at their verdict; hence it is inconsistent and incompatible with the dictates of common justice for counsel to attempt to influence them by statements of facts outside the range of evidence, or to assume a fact as though proven when no such inference can be reasonably drawn from the evidence. True, jurors are sworn to try the cause according to the law and evidence, and all proper intentions must be accorded them while in the discharge of their functions; but it is not beyond human probability that they might be unconsciously influenced by adroit statements of facts not pertinent to be submitted to them, interweaving them with legitimate testimony; so it has become a salutary rule of law that if counsel is permitted to pursue such a course, when timely objection has been made, it will constitute cause for reversal. Uncalled for personal abuse by counsel of parties or their witnesses calculated to inflame the passions of the jury, and materially prejudice the case adversely to the party complaining, if repeated and persisted in after being directed to desist, will also afford grounds for a reversal. But when arguing within the limits of admitted or controverted facts the counsel should enjoy the greatest

latitude consistent with decorum and a reasonable ambition to succeed by honorable means. It is usually, however, within the discretion of the trial judge to determine whether counsel transcend the limits of professional duty and propriety in this particular, and the exercise of such discretion is not the subject of review, except where they are permitted to travel out of the record, or to persist in disregarding the admonitions of the trial judge, or to indulge in remarks of a material character so grossly unwarranted and improper as to be clearly injurious to the rights of the party assailed: Proffatt, Jury, § 250; Weeks, Attys. at Law (2 ed.), §§ 1112, 1113; 2 Ency. Pl. & Pr. 727, 747, 749; *Tenny v. Mulvaney*, 8 Or. 513; *State v. Anderson*, 10 Or. 448; *McDonald v. People*, 126 Ill. 150 (18 N. E. 817, 9 Am. St. Rep. 547); *Cleveland Paper Co. v. Banks*, 15 Neb. 20 (16 N. W. 833, 48 Am. Rep. 334); *School Town of Rochester v. Shaw*, 100 Ind. 268; *Fletcher v. State*, 49 Ind. 124 (19 Am. Rep. 673); *People v. Ah Len*, 92 Cal. 282 (28 Pac. 286, 27 Am. St. Rep. 103); *Tucker v. Henniker*, 41 N. H. 317; *Hickey v. Behrens*, 75 Tex. 488 (12 S. W. 679); *House v. State*, 19 Tex. App. 227; *Snodgrass v. Commonwealth*, 89 Va. 679 (17 S. E. 238); *State v. Shawen*, 40 W. Va. 1 (20 S. E. 873); *Burton v. O'Niell*, 6 Tex. Civ. App. 613 (25 S. W. 1018); *State v. Emory*, 79 Mo. 461; *People v. Hess*, 85 Mich. 128 (48 N. W. 181); *Spahn v. People*, 137 Ill. 538 (27 N. E. 688).

Now, there is evidence in the case upon which an inference may be fairly predicated that the plaintiff was induced to part with his money by indirection; that Miller & Miller were allied in some manner, not fully disclosed, with the makers of the alleged notes; and that all were engaged in a common purpose to obtain money on the credit of irresponsible parties. This condition gave rise to the especial characterization by counsel and a comparison of the transactions with a bunco scheme. However severe the arraignment of the parties concerned, the argument was within the range of the facts in evidence, and there was no manifest attempt on the part of counsel to purposely drag into the case extraneous facts or matters not legiti-

mately before the jury, with a view to influencing their verdict. So there was no error upon this phase of the question. It must be conceded that counsel's strictures upon the firm of Miller & Miller and Cook and Howland were extremely severe, and his comparison of them with vultures and wolves, and insistence that they were fit subjects for the penitentiary, brings the case to the very verge of professional propriety in the employment of invective and abuse. Objection, however, was at once interposed, and the ruling of the trial court taken concerning the manner of the argument, with the result that he was permitted to proceed without admonition. By presiding over the trial and noting the bearing of the parties and witnesses, and the testimony in detail, and having in mind the full scope of the case as it appears upon questions of fact to be submitted to the jury, the trial judge acquires exceptional facilities and advantages for determining whether excess in argument through invective and abuse is being indulged in; hence it is that the appellate court will not disturb his ruling touching the matter, unless in the exceptional cases above noted. The remarks complained of do not fall within the proscription of the exceptions, and we cannot, therefore, disturb the discretion of the trial court, although we are impressed that it should have been exercised differently. **AFFIRMED.**

Decided 17 March, 1902.

TROTTER v. STAYTON.

[68 Pac. 3; 8 Munic. Corp. Cas. 91.]

1. Subject to the exceptions provided by statute (Hill's Ann. Laws, § 71), litigants will not be permitted to urge on appeal propositions not presented before the trial court.

BOUNDARIES—MATERIALITY OF SUBSEQUENT SURVEYS.

2. In determining ancient boundaries the rule is to follow as closely as may be the lines of the original survey, and subsequent surveys not intended to fix on the ground the location of such lines are irrelevant.

From Marion: REUBEN P. BOISE, Judge.

Suit by G. D. Trotter against the Town of Stayton. From a decree dismissing the complaint, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. John A. Carson and Loring K. Adams.*

For respondent there was a brief and an oral argument by *Mr. William H. Holmes.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to quiet title to a small strip of land on the east and north sides of the north half of lots 5 and 6 in block 5, in the Town of Stayton, as laid out and platted in 1871. The point of controversy is the true location of the west line of Third Street and the south line of Ida Street. As originally laid off the town consisted of six blocks, and the initial corner was a point 2.97 chains north of the quarter section corner between sections 10 and 15, township 9 south, range 1 west. From this point the lots, blocks, streets, and alleys were all specifically and definitely described by courses and distances, but no monuments, natural or artificial, are referred to in the survey, or, so far as the evidence shows, established on the ground. In 1900 the street lines were surveyed by Mr. Gobalet at the instance of the town council. At that time the plaintiff's property was uninclosed, and a short time thereafter, at the request of the town authorities, he put down a sidewalk to conform to the lines run by Gobalet, with the understanding, as he testifies, that it would be moved if it was not on the true street line. A few months later he and some of the other residents of the town, not being satisfied with the Gobalet survey, employed the county surveyor to re-establish and relocate the lines. And as his survey in front of plaintiff's property did not conform to that of Gobalet, the plaintiff moved his sidewalk to the line run by the county surveyor, inclosed his property with a fence, and soon thereafter commenced this suit. The complaint alleges that the plaintiff is the owner and in

possession of the north half of lots 5 and 6 in block 5 in the Town of Stayton, as dedicated and shown on the recorded plat thereof, and that such property adjoins and abuts on Third Street on the east and Ida Street on the north; that the defendant claims an adverse interest in a strip of land off the north end thereof 12 inches wide and a strip $6\frac{1}{2}$ inches wide on the east side; that such claim constitutes a cloud on his title, and interferes with his peaceful and quiet possession of the property, and prays that it be required to appear and set forth the nature of its claim, and that it be decreed to be void and of no effect. The defendant answered, denying the material allegations of the complaint, except the incorporation of the defendant, and that the plaintiff is the owner of the north half of lots 5 and 6. For an affirmative defense it alleges that plaintiff is the owner of the strip in controversy, subject to the rights of the public therein under the laws of the state and such ordinances as the defendant may lawfully enact. "That prior to the month of June, 1900, the boundaries of the different streets and alleys in the said Town of Stayton were not accurately known to the common council of the said city, and in pursuance of the powers vested in it, under the terms of its charter, it caused an accurate survey to be made of the location of the different lots and blocks, and also the streets and alleys therein; that all the interest which the Town of Stayton claims in the strips of land, 12 inches and $6\frac{1}{2}$ inches in width, as described by the plaintiff in his complaint, is for the use of the public, and the same is a part of the public highway and a part of the streets of the Town of Stayton." A reply was filed, denying the affirmative allegations of the answer, and upon a trial the court found that the town council had authority to ascertain the location of the streets of the city, and that they were properly located by Gobalet's survey. The plaintiff's complaint was thereupon dismissed, and he appeals.

1. It will be observed from the pleadings that the only question for our determination is the true location of the street lines in front of plaintiff's property. There is some discussion

in the defendant's brief of the doctrine of prescription, estoppel, and acquiescence, but as no such defenses are pleaded the argument is not germane to any questions involved in the case. The answer avers that the location of the street and alley lines of the town were not known to the council, and, for the purpose of ascertaining the same, it "caused an accurate survey to be made of the location of the different lots and blocks, and also the streets and alleys therein." The only issue therefore tendered is the accuracy of the survey made at the instance of the town authorities.

2. If the initial point from which the town was originally surveyed and located is to be taken as the beginning point, and the survey extended therefrom according to the courses and distances called for in the dedication, it is obvious that the plaintiff must prevail. Mr. Herrick, the county surveyor, testifies that he found the quarter section corner, and, by going 2.97 chains north, found the initial point mentioned in the dedication by Stayton and wife; that he followed the courses and distances called for, and had no difficulty in ascertaining the location of the plaintiff's property and its boundaries; that the lines as run by him, and which followed the calls in the dedication, did not conflict with any of the property in the original town, and he was satisfied they were correct. Mr. Gobalet, who made the survey for the town, says he was employed to straighten out and re-establish the street lines so as to make those in the original town conform as nearly as practicable to those of subsequent additions. In order to do so he found it necessary to establish a new base on Third Street two blocks east of the original initial corner from which to make his survey, for the reason that a survey therefrom "will conflict with less property and street lines than any old or new base that may be adopted in the Town of Stayton." Mr. Richardson, who was street commissioner at the time of the Gobalet survey, and who assisted him in making it, says that "After we ran two or three lines through they did not suit. It was going to damage too much property to move these buildings. Then we went to work and measured these blocks to see

how large they were clear up through this addition up to Washington Street (in a new addition and four blocks north of the north line of the original town). We measured them to find out how far across it was to these lots. Then Gobalet ran a line there through that line, and it did not exactly suit. It cut too much property; * * right here on Washington Street. These lines came in about here. I would not be positive to the lap, probably seven or eight feet." He further testifies that after several measurements and remeasurements they finally found a line which interfered with very little property, and they accepted that as the base from which to extend the survey of the town and its additions; that the object the council had in making the survey was to have the streets as straight and regular as practicable, making those in the old town conform as nearly as practicable to the streets in the several additions. Mr. Davie, mayor at the time of the Gobalet survey, says that the purpose was to have the streets of the town straightened, following the old survey as nearly as it could be done and accomplish that purpose, and that Gobalet was given instructions to that effect. It will thus be seen that Gobalet, in making his survey, was not attempting to relocate the original lines, but, as instructed by the town authorities, to straighten out the streets, so that those in the original town and the subsequent additions might conform as nearly as practicable. Under such circumstances his survey could be of no value as evidence in determining the question before the court. The ruling question is the true location of the west line of Third Street and the south line of Ida Street. As the plaintiff's property is described with reference to the lots and blocks as originally laid out in accordance with certain courses and distances, the point to be determined is the location of the lines so established, and no survey could be accurately based upon any other data. All subsequent surveys or resurveys are of no effect as evidence unless they tend to determine that question: *Bower v. Earl*, 18 Mich. 367; *Hale v. Cottle*, 21 Or. 580 (28 Pac. 901); *King v. Brigham*, 19 Or. 560 (25 Pac. 150); *City of Racine v. Emer-*

son, 85 Wis. 80 (55 N. W. 177, 39 Am. St. Rep. 819); *Albert v. Salem*, 39 Or. 466 (65 Pac. 1068).

The question as to whether the council had authority under its charter to relocate and re-establish the lines of the streets and alleys of the town is not involved in this case. There are neither allegations nor proof that such power, if it existed, has ever been exercised. The answer of the defendant avers that the survey by Gobalet was made because the boundaries of the different streets and alleys were not known to the council, and was intended to locate them; but there is no allegation that it was made for the purpose of changing or re-establishing the lines. In September, 1900, the council passed an ordinance providing for the employment of a competent surveyor to "survey, straighten, and establish the boundary lines of all the streets and alleys now laid out and platted in the corporate limits of the town and establish a permanent monument at the end of each boundary line and at such intermediate points" as might be deemed proper, and to "cause a correct plat or map thereof to be made" and filed in the office of the recorder; but that the survey and plat contemplated in and provided for by the ordinance was ever made is not shown. The survey of Gobalet was made some months before the passage of the ordinance, and there is no evidence that it was ever adopted or accepted by the council as a compliance with the terms of the ordinance.

It is also urged that this suit should be dismissed because the plaintiff was not in lawful possession of the property at the time it was commenced, but we think the evidence fully sustains the allegations of the complaint in this regard. The fact that the plaintiff built a sidewalk to conform to the Gobalet survey and afterwards cut a part of it off in order to make it agree with Herriek's survey does not make his possession unlawful. He was the owner and in possession of the property when he built the sidewalk, and his action in sawing off a few inches of it was no more unlawful than the building of it in the first instance. There was no trespass committed at either

time; he was in possession when he built the walk, and has not been ousted or dispossessed since that time.

The decree of the court below must be reversed, and one entered here in favor of the plaintiff. REVERSED.

Argued 18 February; decided 17 March, 1902.

LARCH MOUNTAIN INVEST. CO. v. GARBADE.

[68 Pac. 6.]

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642 883

ESTOPPEL.

1. One who has, with knowledge of the surrounding circumstances, deliberately assumed a particular position, must act consistently, and will not be permitted to change his position to the prejudice of others who, to his knowledge, have relied on his conduct in protecting their rights.*

WAIVING OBJECTION TO EQUITABLE JURISDICTION.

2. An objection to the jurisdiction on the ground that plaintiff's remedy is at law, and not in equity, not made in the court below, is waived: *Municipal Sec. Co. v. Baker County*, 33 Or. 338, followed.

APPEAL—CONCLUSIVENESS OF FINDINGS.

3. In deciding an equity case it is the duty of the Supreme Court of Oregon, under Section 543 of Hill's Ann. Laws, to reach its conclusions by original investigation, and the findings of the trial court are only advisory, though they may be persuasive: *Nessley v. Ladd*, 29 Or. 354, approved; *Willis v. Smith*, 36 Or. 601, and *Browning v. Lewis*, 30 Or. 11, explained.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit by the Larch Mountain Investment Co., to determine the ownership of \$2,271.21, deposited by the plaintiff with the sheriff of Multnomah County, for the purpose of redeeming from the defendant Garbade certain land sold under an execution on a judgment against it. The facts are that on September 28, 1898, one Gilchrist recovered a judgment against the plaintiff in the circuit court of Multnomah County for about \$2,000. At the time the plaintiff was the owner of 1,200 acres of timber land in that county of the probable value of \$25,000. On February 13, 1899, all its interest therein was sold under an execution issued on the Gilchrist judgment, and

*NOTE.—See, to the same effect, *Wyatt v. Henderson*, 31 Or. 48; *Anderson v. Portland F. M. Co.* 37 Or. 483; *Mattis v. Hoemcr*, 37 Or. 523; *Christenson v. Nelson*, 38 Or. 473.—REPORTER.

purchased by the defendant the Bridal Veil Lumbering Co., for \$2,046.67, which sale was confirmed on March 7, 1899. Two days later the defendant Garbade, as a lien creditor under a judgment recovered by him against the plaintiff on January 9, 1899, for \$9,108.26, redeemed from the lumbering company. Thereafter, and on March 14th, a decree was rendered against the plaintiff in favor of the lumbering company for \$15 costs in a suit against the latter. On April 25th an execution was issued thereon, and the entire 1,200 acres levied upon, and advertised for sale on June 10th. On May 10, 1899, after the issuance of the execution on the \$15 decree, and before the time fixed for the sale, the defendant lumbering company and Garbade entered into a written contract by the terms of which Garbade agreed that he would pursue such legal remedies as might be available to him to acquire the legal title to the property, and sell the same to the lumbering company for \$12,000, \$4,000 of which was paid down at the time of the execution of the agreement, and the remainder after he should acquire title. It was stipulated in the agreement, in case he failed to acquire title, he would refund the money received, with interest thereon at 10 per cent per annum. It was also agreed that, in case the property should be redeemed from Garbade, he would repay to the lumbering company such sums as may have been paid by it, with interest thereon; and in case of any redemption other than upon the Gilchrist judgment he should return any moneys received by him under the agreement, it being understood, however, that, unless "on such redemption said party of the first part [Garbade] shall receive the moneys paid by him on redemption in said Gilchrist matter, there shall be deducted from any amount so agreed to be paid by the parties of the first part the sum of \$2,067.86 (being the amount paid by said party of the first part on redemption in said Gilchrist sale), or such or any part of said amount as he shall fail to receive on such redemption, together with interest thereon at the rate of 10 per cent per annum from March 9, 1899; and the said party of the second part shall thereupon be entitled to all and

every benefit or advantage which may exist by reason of the judgment and sale on execution in said Gilchrist matter.”

Thereafter the entire property was sold under the \$15 decree in favor of the lumbering company, and purchased by Garbadé for \$40.25, and such sale was confirmed on June 16, 1899. The plaintiff had no actual knowledge of the sale or the confirmation until the time for the redemption had expired; but a short time after the sale, and in ignorance thereof, appealed from the judgment, and gave an undertaking to stay proceedings. On January 27, 1900, the plaintiff attempted to redeem from the sale under the Gilchrist judgment by paying to the sheriff the amount of money necessary therefor, but Garbadé refused to receive it, or to recognize the validity of such attempted redemption. Thereafter, fearing that the first redemption was irregular, and perhaps invalid, the plaintiff notified Garbadé that it would redeem on March 3, 1900, at which time it appeared by its attorney at the sheriff's office, and deposited with that officer \$2,271.21, the amount necessary to effect such redemption. The defendants Woodward & Palmer, attorneys for Garbadé, although present, refused to recognize the validity of this redemption, or to accept the money, and it remains in the custody of the sheriff. Thereafter, and while matters were in this condition, negotiations for the purchase of the property were opened between the plaintiff and the lumbering company, which finally resulted in a sale thereof to the latter for \$25,000, in pursuance of which the plaintiff and defendant Garbadé conveyed to the lumbering company on June 21, 1900, their respective interests in the property, and Garbadé was paid the balance due him under his contract with the lumbering company of May 10, 1899. As soon as these transactions were consummated, and the money paid over to Garbadé, one of his attorneys immediately appeared at the sheriff's office, and demanded the money deposited with that officer; but in the meantime the sheriff had been notified by the plaintiff that the attempt to redeem was abandoned, and not to pay the money over to Garbadé or his attorneys. Thereafter this suit was brought against the sheriff and all parties

interested in the fund to determine the ownership thereof. About the time it was commenced, Garbade and his attorneys, Woodward & Palmer, who had represented him in all the proceedings involved in this controversy, and through whom the entire negotiations were conducted, entered into an agreement to divide equally between themselves the money on deposit with the sheriff, and so they are all made parties to this suit. The decree of the court below was in favor of the defendant Garbade and against the sheriff personally for the money in his hands, from which plaintiff and defendant Frazier appeal.

REVERSED.

For appellants there was a brief over the names of *Watson & Beekman, Joseph & Schlegel* and *John H. Hall*, with an oral argument by *Mr. Edward B. Watson* and *Mr. Frank Schlegel*.

For respondent Bridal Veil Lumber Co., there was a brief and an oral argument by *Mr. William D. Fenton*.

For respondents Woodward, Garbade, and Palmer there was a brief over the names of *John H. Woodward, Clinton C. Palmer* and *Charles J. Schnabel*, with an oral argument by *Mr. Woodward* and *Mr. Warren E. Thomas*.

MR. CHIEF JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion of the court.

The plaintiff contends as a matter of law: (1) That under the contract of May 10, 1899, between the Bridal Veil Lumbering Co. and Garbade, the money in controversy, if the redemption from the Gilchrist sale is to be treated as valid, belonged to the lumbering company, and, as its interest therein has been transferred to the plaintiff, it should prevail in this suit; and (2) that Garbade's refusal to accept the money, or to recognize the validity of the redemption, was a waiver of any claim to it on his part, which became irrevocable when plaintiff notified the sheriff that the attempted redemption was at end, and not to pay it over to him. We do not deem it necessary to con-

sider either of these questions, because we are all agreed that upon the facts the equities are with the plaintiff, and it is entitled to the relief demanded. The evidence shows beyond controversy that the defendants, Woodward & Palmer, who were the representatives and acted for the defendant Garbade in all the transactions, not only refused to accept the money deposited with the sheriff for the redemption, but insisted that such redemption was void until after Garbade had parted with all his interest in the property and had received all the money he was entitled to either on account of his judgments against the plaintiff or the contract between himself and the lumbering company of May 10, 1899; and that they allowed and permitted the property to be sold and conveyed by the plaintiff to the lumbering company under the belief, induced by their acts, silence, and conduct, that Garbade had and would make no claim to the money deposited with the sheriff for redemption. Mr. Joseph, attorney for the plaintiff, testifies that, although Garbade and his attorneys were notified of the purpose to redeem, neither of them appeared at the sheriff's office on January 27th, at the time the first redemption was attempted; that shortly afterwards he met the defendant Palmer, who claimed that the redemption was invalid because not authorized by the plaintiff corporation; that, after looking the matter up, he concluded, in order to avoid question about the matter, to redeem again. A meeting of the board of directors was thereupon called, and a resolution passed authorizing the redemption. Notice was served upon Garbade, and witness further testifies that on March 3d "I went to the sheriff's office to make this redemption. Mr. Garbade was represented by Messrs. Woodward & Palmer, who appeared at that time. The sheriff had obtained a certificate of deposit for the money paid him January 27, 1900, and at the time of the redemption on March 3d I simply added the accrued interest from the date of the last redemption, and paid that in money to the sheriff. Messrs. Woodward & Palmer appeared there, and asked if the sheriff had the money. The sheriff said, 'Yes.' They said, 'Produce it.' The sheriff then pro-

duced the certificate of deposite, and Mr. Palmer laughed, and said: 'That don't go. You have got to produce the money, —the cash itself,—and this is money that has been paid in at a prior time. This certificate of deposit cannot be used,' —and then they left the sheriff's office * * The same afternoon I telephoned Mr. Thielsen that I thought I better get the money and tender it to Messrs. Woodward & Palmer, or at least get the cash and have the cash in his possession. I went to the Merchants' National Bank, and in about ten minutes Mr. Thielsen came, and got the money, and I saw him take the money in a sack.' Mr. Meyer, one of the deputy sheriffs, testifies that about 2:45 or 2:55 a certificate of deposit for \$2,250.61 was taken to the bank and cashed, and 'I telephoned to Mr. Palmer that the cash, amounting to \$2,271.20, was at hand, and he replied that he didn't care for that, as that was not the trouble, or words to that effect.' Mr. Duniway, who was the attorney for the lumbering company, and assisted in drawing the contract of May 10, 1899, between it and Garbade, and who was very anxious to acquire the title to the property for his clients, testifies that he thought the redemption was invalid, and that Garbade was entitled to a deed to the property; that he and Woodward went to the sheriff and his legal adviser, and tried to get him to execute a deed to Garbade under the Gilchrist sale, and threatened to commence a mandamus proceeding to compel him to do so, but the sheriff refused to make such a deed; that afterwards Mr. Bradley, the manager of the lumbering company, concluded that it would be better to consider the second redemption as valid, whereupon he and Bradley went to the office of Woodward & Palmer, stated to them the views of the lumbering company, and requested them to withdraw and accept the money on deposit with the sheriff; but they objected to doing so, giving as a reason that the time might expire without redemption from the \$15 sale, and it would be well to wait, and see whether or not a deed could be obtained under such sale, before taking any decided action in the matter of the attempted redemption. It was thereupon understood and

agreed by Duniway and Woodward & Palmer that no further steps should be taken by Garbade touching the attempted redemption, but the money should be allowed to remain with the sheriff, so far as they were concerned, until after it was ascertained whether Garbade would be able to obtain a deed under the sale made on the \$15 decree. And this, as Duniway says, was on the theory that the redemption was ineffectual, and that the refusal of Garbade to accept the money would increase his "equities" under the sale on the \$15 decree.

This was the condition of affairs when the negotiations referred to were entered into between the Bridal Veil Lumbering Co., and plaintiff, resulting in a contract by which the lumbering company agreed to purchase of plaintiff for \$25,000 the land owned by it, and which had been sold under the Gilchrist judgment and under the \$15 decree, to be paid or secured substantially as follows: \$1,000 down; the acceptance by Garbade of the money paid the sheriff to redeem the premises from the sale made on the Gilchrist judgment as a part of the amount due him; the payment by the lumbering company of the judgment in favor of Garbade and against the plaintiff amounting at that time to \$10,143; and the execution and delivery of its promissory notes for the balance. After the terms of the sale had been agreed upon, and before the time for redemption under the \$15 decree had expired, Mr. Fenton, attorney for the lumbering company, called upon Woodward in reference to the matter, and, as he testifies "communicated to him, as the attorney for Mr. Garbade, substantially the details of the proposition made by the Laréh Mountain Investment Co., and the proposition and acceptance made by the Bridal Veil Lumbering Co. Judge Woodward said to me that he thought we were foolish in undertaking to negotiate with these people until after the expiration of the year; that the year would expire, as I remember, the 16th or 17th of June, or somewhere in that neighborhood. * * I said to him that my client, the Bridal Veil Lumbering Co., was not willing to stand upon that sale or rely upon that title: that

they desired to purchase from the Larch Mountain Investment Co., and end all litigation; that I had some question as to the validity of that sale, and as a business proposition my clients had concluded to deal with the Larch Mountain Investment Co., at the same time keeping their contract with Mr. Garbade. 'Well,' he said, 'they may discover that this sale has been made, and they may redeem, and you will deprive us of our opportunity to carry out that contract.' I remember saying to him, 'We will take whatever title you have, and, if you haven't anything, we won't get anything from you, but we will take a deed from Mr. Garbade under that contract.' But I said: 'In the arrangement we are making with the Larch Mountain Investment Co., the \$2,370 that is in the sheriff's hands is to go to the credit of the Bridal Veil Lumbering Co., and you ought to draw down that money yourself, or else you ought to give an order.' Either at the first interview or the second interview—I don't know which—Judge Woodward said Mr. Garbade was at Oregon City, or somewhere out of town; and he said Mr. Garbade would have nothing to do with the \$2,370; that he had not recognized it as a redemption, and that he would maintain a consistent course, and wouldn't surrender the certificate, and wouldn't give an order and wouldn't draw down the money himself, and give credit on that contract. He said, 'you can pay your money under that contract, and that money will take care of itself.' I said, 'If we pay you the full amount under the contract, then you people will turn up and claim the \$2,370.' He said, 'Mr. Garbade will have nothing to do with that, and has never recognized that as a redemption.''' The result of this conversation, together with Woodward's statements and disclaimers, were by Mr. Fenton immediately communicated to the representatives of the plaintiff.

During the interview it was suggested that Mr. Fenton prepare such papers as he desired to have Garbade execute, and send them over to Woodward's office. In pursuance of this arrangement the papers were prepared, and sent over on the morning of the 21st, by Mr. Bradley, the manager of the

lumbering company, together with a note from Fenton requesting Woodward & Palmer to have the two certificates of sale held by Garbade assigned to Judge Watson, so that Watson could draw down the money in the sheriff's hands, and that he and his wife could quitclaim to the lumbering company. Mr. Bradley testifies that he had quite a long conversation with both Woodward and Mr. Palmer, and that they suggested that the lumbering company was very foolish to go on with the negotiations, for the reason that they hoped to get title under the sale made in the \$15 case, so that they could sell it to the company for \$12,000, while under the contemplated arrangement it was paying \$25,000. "I told them that our board of directors had held a meeting, and that we had discussed all these matters, and had decided that from purely a business standpoint that we preferred to go ahead with these negotiations and purchase the property, get possession of it immediately. * * After arguing some time, * * they said they were ready to close a contract if we paid them the amount of money which was due upon it. I told them that in these negotiations it was contemplated that part of this money (I think the sum of \$2,270 and some cents) that they should draw that from the sheriff, and should apply it in part payment upon what we owed—upon the \$12,000 contract,—and that we were ready to pay them the balance; and their reply was that they would not have anything to do with this money in the sheriff's hands, but that, if we would pay the full amount down under their contract with the lumbering company, they were ready to comply with it." The witness further testifies that he went from there over to the office of the plaintiff, and informed its attorneys of his conversation with Woodward & Palmer, and what they were willing to do. On the morning of June 21st, Mr. Duniway, at the request of Mr. Fenton, had an interview with Woodward & Palmer in reference to the proposed sale of the property, and Duniway testifies that after considerable conversation with Palmer he (Palmer) stated that Garbade would not execute the papers which had been sent over by Mr. Fenton, but that if the lumbering company would

pay to him \$8,891.10, the balance due on his contract with it, Garbade would execute certain deeds and assignments. The plaintiff being advised of this fact, and of the negotiations between the representative of the lumbering company and Garbade, concluded that it could safely consummate the contract on the theory that Garbade made no claim to the money in the sheriff's hands. It thereupon conveyed the property to the lumbering company, and caused to be paid to Garbade, at the office of Woodward & Palmer, about 5 o'clock in the afternoon of June 21st, the balance due him under the contract of May 10, 1899, and Garbade conveyed to the lumbering company all his interest in the property in controversy, and executed some other papers necessary to effect a complete settlement and adjustment of all matters between them.

When it was ascertained that the deal would be consummated, the defendant Palmer, without the knowledge of any of the other parties to the transaction, went to the sheriff's office, leaving the final consummation of the matter to Woodward, and as soon as he (Palmer) was advised by telephone that the transaction had been closed, and the money paid to Garbade, for the first time demanded the money of the sheriff previously deposited with him by the plaintiff for the purpose of redeeming from the sale under the Gilchrist judgment. But one of the plaintiff's attorneys, two or three hours prior to that time, becoming suspicious that some such plan was contemplated, had notified the sheriff not to pay the money over to Garbade or his attorneys. All the transactions in reference to the attempted redemption and all negotiations looking to the sale of the property were had with Woodward & Palmer alone. Garbade did not personally appear in the matter until just a few moments before the final papers were executed. Messrs. Woodward & Palmer, in their testimony, give a slightly different coloring to the facts from that detailed by other witnesses, but there is really no substantial conflict.

1. We have thus set out the testimony somewhat in detail, because, in our opinion, the facts speak for themselves, and require no argument to show that the equities are all with the

plaintiff. It is apparent from the entire testimony that, so long as it was deemed to be to the interest of Garbade to deny the validity of the attempted redemption, and to refuse to accept the money paid to the sheriff for that purpose, his attorneys persistently and consistently occupied that attitude; and, having assumed that position, they ought not to be permitted to change it to the injury of the plaintiff, simply because it is to their interest to do so. It is an elementary principle that if one, by his statements as to matters of fact or as to his intended abandonment of asserted rights, induces another to change his condition in reliance upon them, he will afterwards be estopped to deny the truth of the statements, or to enforce his rights against his declared intention to abandon them. In short, one cannot play fast and loose, but, having taken a particular position deliberately, he must act consistently with it, and cannot assume a contrary position to the prejudice of another: *Shields v. Smith*, 37 Ark. 47, and *Bigelow*, Estoppel, 713. This is the position the defendants occupy in this case. By their conduct and statements, as well as their silence when they should have spoken, they naturally induced the lumbering company and the plaintiff to believe that they did not intend to recognize or admit the validity of the attempted redemption, or make any claim for the money deposited with the sheriff for that purpose. Having assumed that attitude, and allowed the contract between the plaintiff and the lumbering company to be consummated under such a belief, Garbade is clearly estopped from afterwards changing his position to their injury.

It is true, as the defendants insist, that Woodward & Palmer, acting for Garbade, refused to consent that he should transfer his certificates of redemption, or give an order on the sheriff for the money on deposit with him; but it is also true that, although advised by Mr. Fenton of the terms of the contract between the plaintiff and the lumbering company, they did not inform him, or any other witness in the case, that Garbade intended to claim a right to the money in addition to the amount due him under the contract of May 10th. When it

was explained to Woodward that it was contemplated that the redemption money should be applied on the balance due under such contract, Woodward did not say that the money belonged to Garbade, but, on the contrary, stated to Fenton that he "would have nothing to do with the \$2,370," that he had never recognized it as a redemption, and that he would maintain a consistent course." The subsequent refusal to transfer the certificates or give an order on the sheriff for the money was in harmony with this declaration of Garbade's purpose and conduct. If it was intended that Garbade should claim the money on deposit with the sheriff, equity and fair dealing required that such intention should have been made known during the progress of the negotiations, and not, as the evidence clearly indicates, an attempt made to conceal his real purpose. The defendant Palmer's conduct in leaving his office at the time the money was ready to be paid to Garbade, and hurrying up to the sheriff's office, and there waiting until advised that the transaction had been consummated, and then for the first time demanding the money, is most cogent and convincing proof that defendants knew that the plaintiff and the lumbering company had acted with the understanding and belief that the money in the sheriff's hands would belong to them, and not to Garbade. This action on the part of Mr. Palmer was not the result of a sudden impulse. It was attended with every evidence of a deliberate and thoroughly arranged plan. He took with him to the sheriff's office copies of all papers necessary, as he thought, to establish Garbade's claims to the money, and would probably have secured it had it not been for the previous notice to the sheriff by the plaintiff not to pay it over.

2. It is argued that the plaintiff's remedy is at law, and not in equity, and that the findings of the trial court on conflicting testimony should not be disturbed on appeal. No objection to the jurisdiction was made in the court below, but, on the contrary, the defendants answered, asking affirmative relief, and so waived that question: *Kitcherside v. Meyers*, 10 Or. 21;

O'Hara v. Parker, 27 Or. 156 (39 Pac. 1004); *Municipal Sec. Co. v. Baker County*, 33 Or. 338 (54 Pac. 174).

3. The effect to be given to the findings of the trial court on an appeal from a decree was considered, and the true doctrine announced, in *Nessley v. Ladd*, 29 Or. 354 (45 Pac. 904). There is nothing in the opinions in *Willis v. Smith*, 36 Or. 601 (58 Pac. 527), or *Browning v. Lewis*, 39 Or. 11 (64 Pac. 304) to conflict therewith. The decree of the court below will therefore be reversed, and one entered here for the plaintiff.

REVERSED.

Argued 27 February; decided 24 March, 1902; rehearing denied.

BAINES v. COOS BAY NAVIGATION CO.

[68 Pac. 397.]

41 135;
45 309;

PLEADING—INCONSISTENT DENIALS AND DEFENSES.

1. Under the established rule that where denials and affirmative defenses are inconsistent, the defenses are taken as true. An allegation in the answer, in an action against a corporation on a note alleged to have been executed by the corporation, that the note was executed and delivered as alleged in the complaint, in pursuance of a fraudulent conspiracy between plaintiff and an officer of the corporation, is an admission that the officer executing the note had authority to do so, and precludes the corporation from urging the defense of his want of authority, though it is also alleged in the answer: *Maxwell v. Bolles*, 28 Or. 1, followed.

SUFFICIENCY OF EVIDENCE—PROVINCE OF JURY.

2. The evidence for the plaintiff herein was sufficient to carry the case to the jury, as it fairly tended to support his claim.

CORPORATIONS—COMPENSATION OF OFFICERS.

3. Where the duties of an officer of a corporation are merely nominal, he is entitled to compensation for other services having no connection therewith, which he performs for the corporation: *Mitchell v. Holman*, 30 Or. 280, cited.

From Coos: JAMES W. HAMILTON, Judge.

Action by W. E. Baines against the Coos Bay, Roseburg & Eastern Railroad & Navigation Co., and another. From a judgment in favor of the defendants, the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by Messrs. Joseph W. Bennett and T. S. Minot.

For respondent there was a brief over the names of *J. S. Coke Jr.*, and *S. H. Hazard*, with an oral argument by *Mr. Geo. H. Williams* and *Mr. J. Couch Flanders*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action on two promissory notes, for \$4,000 each, dated April 18, 1894, alleged to have been made, executed, and delivered for a valuable consideration to the plaintiff by the defendant corporation. The complaint is in the usual form, setting out the notes *in hanc verba*, from which it appears they were each signed, "The Coos Bay, Roseburg & Eastern Railroad & Navigation Co., by R. A. Graham, General Manager." The answer denies, upon information and belief, the execution of the notes by the corporation, and sets up, among other defenses, the following: "(1) That at the time the two promissory notes in complaint set forth were made, executed, and delivered, as in complaint alleged, the defendant corporation was not indebted to the plaintiff in any amount whatever, but that at said time the defendant R. A. Graham was indebted to the plaintiff in the amount stated in said two notes, and the said two notes in complaint mentioned were made, executed, and delivered in pursuance of a fraudulent conspiracy made and entered into by and between the plaintiff and the defendant R. A. Graham, in order that it might be made to appear that the amount of said two notes was a debt of the defendant corporation instead of a debt of the defendant R. A. Graham; that the plaintiff was duly elected, qualified, and acting director of the defendant corporation from the 19th day of August, 1890, the date when the defendant corporation was organized, until the 29th day of December, 1893, and well knew that the defendant corporation was not indebted to him in any amount whatever; and that the defendant R. A. Graham was indebted to him the amount of said two notes in complaint set forth, and in order to enable the defendant R. A. Graham to cheat and defraud the defendant corporation; (2) that from the 19th day of August, 1890, until about the 1st day of January, 1900, the defendant R. A. Graham was director and general manager of

the defendant corporation, and while so acting as director and general manager of the defendant corporation the defendant R. A. Graham paid to the plaintiff upon said two notes in complaint set forth the amount of money in complaint alleged to have been made, and paid upon said two notes other sums of money not mentioned in complaint, but how much this defendant corporation does not know and is unable to state, but whether or not said sums of money so paid by the defendant R. A. Graham upon said two notes were paid out of his own funds or paid with money belonging to this defendant corporation this defendant is unable to state; (3) the defendant corporation further alleges that, after the making of the two promissory notes in complaint set forth, the defendant R. A. Graham sold, assigned, and transferred to the plaintiff real and personal property as payments upon said two notes in complaint set forth, the description of which this defendant corporation does not know and is unable to give; but the defendant corporation states and alleges that the defendant R. A. Graham has fully paid, satisfied, and discharged the said two promissory notes in complaint set forth, by the payments in complaint alleged to have been made, and by other cash payments, and by real and personal property sold and transferred to plaintiff as aforesaid, and the said two notes have been fully paid, and there is nothing due the plaintiff thereon, and that this suit is instituted and prosecuted in aid of the fraudulent conspiracy above mentioned, made and entered into between the plaintiff and the defendant R. A. Graham, with the view to try and collect as much money as possible from this defendant upon said two notes for the benefit of the defendant R. A. Graham." A motion to strike out this separate defense, on the ground that it is inconsistent with the denials, together with a demurrer thereto, having been overruled, the plaintiff filed a reply denying the new matter in the answer, and upon the issues thus made a trial was had before a jury. At the close of the testimony, the jury, by the direction of the court, returned a verdict in favor of the defendants, and from the judgment rendered thereon the plaintiff appeals.

There were practically only two questions argued in this court: *first*, it was contended that Graham, as the general manager of the defendant corporation, had no power or authority to make or execute promissory notes in its name and on its behalf; and, *second*, that there was no consideration for the notes sued on, but they were made for Graham's individual indebtedness, and not that of the corporation.

1. The first question is concluded by the pleadings. The complaint alleges the execution of the notes by the defendant corporation. This averment is denied, but in its further and separate defense the defendant alleges affirmatively that the promissory notes in the complaint set forth were made, executed, and delivered as "in complaint alleged," and "in pursuance of a fraudulent conspiracy made and entered into" by and between plaintiff and Graham in order to make it appear that the notes were for the debt of the corporation instead of Graham. These allegations of the execution of the note by the corporation are inconsistent with the denial, and, under the law, must be taken as true. It has been held by this court that when a defendant denies the execution and delivery of a promissory note, and in a separate defense alleges that it was made with a fraudulent intent, its execution is admitted because the two statements are inconsistent, and, as between the denial of a fact alleged in the complaint and a direct admission of the same fact in the answer, the admission, and not the denial, will be taken as true: *Vcasey v. Humphreys*, 27 Or. 515 (41 Pac. 8); *Maxwell v. Bolles*, 28 Or. 1 (41 Pac. 661). We are therefore not called upon to inquire at this time whether or not Graham had authority to execute promissory notes for and on behalf of the defendant corporation. The execution by it of the particular notes sued on is admitted by the pleadings, and such admission is binding on the defendant, and precludes the necessity of proof.

2. The remaining question is whether there was any evidence tending to show, or from which the jury could reasonably have found, that the notes were given for a valuable consideration moving from the plaintiff to the defendant company. The

defendant was organized in 1890, with a capital stock of \$2,000,000, all of which was subscribed by Graham, except enough to render the requisite number of persons qualified to serve as directors. At the first meeting of the board of directors in August, 1890, Graham was elected general manager, and given "the general management of the business of the company." At the same time the plaintiff was elected secretary and treasurer, but no resolution was ever adopted defining his duties. The testimony, however, is to the effect that his ordinary duties were to keep a record of the proceedings of the corporation and its directors, and to receive its funds. As soon as the corporation was organized and its officers chosen, it entered into a contract with Graham for the construction of a railroad from Marshfield, in Coos County, to Roseburg, in Douglas County, "to be standard gauge, and to be built in a substantial and proper manner, so as to be successfully operated when built," in consideration of the assignment to him of \$225,000 in subsidy subscriptions and guaranties, and a promise to issue and deliver to him, as fast as definite sections of the road should be located and built, its first mortgage bonds to the amount of \$25,000 per mile. In pursuance of this contract, Graham constructed the road from Marshfield to Myrtle Point, but his contract did not require him to secure the rights of way depots, grounds, or terminal facilities. The plaintiff testifies that, in addition to his duties as secretary and treasurer, which were merely nominal, he acted for and represented the corporation in various other matters, and particularly in securing rights of way, supervising the operation and location of the road, and generally looking after its business, when Graham, the general manager, was not present; that these various matters, together with a trip to New York and London, made at the request and by the direction of the general manager of the company, to assist in negotiating a sale of its bonds, occupied his undivided time and attention from September or October, 1890, until the fall of 1893. About the 1st of April, 1894, he filed a lien upon the roadbed, structures, and superstructures of the corporation to secure the payment of \$12,750, which he

claimed to be still due him for services so rendered to it. A few days later he visited Coos Bay for the purpose of instituting proceedings to foreclose his lien, and while there a compromise was effected between him and Graham as the general manager of the defendant, by which he accepted the two promissory notes set out in the complaint, and satisfied of record the lien previously filed. The testimony of the plaintiff, notwithstanding it is contradicted by other evidence, and that there are many circumstances indicating that the services rendered by him were for Graham, and not the defendant, was nevertheless sufficient to carry the case to the jury.

3. As a general rule, an officer of a corporation cannot recover for services performed in the discharge of his official duties unless in pursuance of a resolution or by-law of the corporation to that effect. Where, however, the services are clearly outside the scope of his duties as such officer, he is entitled to recover on a *quantum meruit*: *Wood v. Lost Lake Mfg. Co.* 23 Or. 20 (23 Pac. 848, 37 Am. St. Rep. 651, and note), and *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616). Now, there was evidence tending to show that plaintiff's official duties as secretary and treasurer of the defendant were nominal, and that the services alleged to have been rendered by him, and which he testifies were performed for the corporation and at the request of its officers, did not pertain thereto. If this is true,—and of that fact the jury are exclusively the judges,—he would be entitled to a compensation for the reasonable value of the services rendered by him, and such claim would be a sufficient consideration for the notes sued upon if the settlement between him and Graham was made in good faith. We are of the opinion, therefore, that, as the record stands, the judgment must be reversed, and the case remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 5 March; decided 31 March, 1902.

STAGER v. TROY LAUNDRY COMPANY.

[68 Pac. 405.]

RES JUDICATA—EFFECT OF FORMER DECISION.

1. An appellate court will not on a second or subsequent appeal revise or reverse its former decisions in a given cause where the facts remain the same: *Portland Trust Co. v. Coulter*, 23 Or. 131, approved.

TRIAL—RIGHT TO DIRECT A VERDICT FOR DEFENDANT.*

2. The jury being the judges of the weight and value of evidence, the court cannot properly direct a verdict for defendant upon a contradiction between witnesses, however direct or comprehensive: *Huber v. Müller*, 41 Or. —, followed.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Barbara Stager against the Troy Laundry Co.
From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an appeal from a second judgment against defendant in this cause, and the principal error relied upon for a reversal is the court's refusal to instruct the jury to return a verdict for the defendant, after both parties had rested. There was a motion for a nonsuit at the close of plaintiff's testimony, which was overruled, and error is also assigned as to that. We will dispose of the two questions thus raised in the inverse order of their statement.

1. It is practically conceded by counsel for both parties that

*NOTE.—As to the right of a trial judge to direct a verdict for plaintiff, see *Shobert v. May*, 40 Or. 68 (55 L. R. A. 810).—REPORTER.

41	141
45	453
41	141
148	595

the evidence adduced at the trial, up to the time of the interposition of the motion for a nonsuit, is, in all material respects, the same as that adduced up to the time of making a like motion at the former trial. We have, therefore, the identical question presented on this appeal that was contested and disposed of on the former: *Stager v. Troy Laundry Co.* 38 Or. 480 (63 Pac. 645, 53 L. R. A. 459). We then concluded, after a careful inspection of the evidence, that the nonsuit was properly denied by the trial court. That view of the question has become the law of the case, and it is not subject to review on a second appeal. The rule has long been established, and is uniformly adhered to, that an appellate court will not revise or reverse its former decisions made in the same cause, and upon the same state of facts, and this for two reasons: (1) They stand as precedents and authority, as if made in any other case upon a like state of facts; and (2) as adjudications between the same parties. The policy of the law and the practical administration of justice require that there should be an end of litigation, and the rule has grown up to meet this requirement. If parties were permitted to present the same issues in the same case as often as they feel aggrieved by the result, litigation would descend into a contest of perseverance and persistence, rather than of legal rights, and it could not be brought to a determination so long as human ingenuity could prevent it. The rule has repeatedly received the sanction of this court (*Powell v. Dayton, S. & G. R. R. Co.* 14 Or. 22, 12 Pac. 83; *Aplegate v. Dowell*, 17 Or. 299, 20 Pac. 429; *Portland Trust Co. v. Coulter*, 23 Or. 131, 31 Pac. 280), and disposes of the contention for a nonsuit.

2. Now as to the motion for a direction to the jury to return a verdict for the defendant. The plaintiff having made a case in the first instance sufficient to go to the jury, it will not be taken away from them later, or at the close of the case on a motion to direct a verdict, where the evidence is merely contradictory or conflicting, as the jury are the judges of the weight of the evidence and must declare as to the preponderance thereof; and the question as to whether the evidence is

legally sufficient to be submitted to them remains the same as if it was raised by a motion for a nonsuit, either at the close of the plaintiff's testimony or of the case. Like a motion for a nonsuit, or a demurrer to the evidence, it admits everything to be true that the testimony legally tends to prove, ascribing to every statement of fact in evidence absolute credence; so that if there is testimony in the case from which the jury can, by application of intelligent and reasonable deduction, fairly and legitimately infer the fact in issue, the jury are to determine the matter, notwithstanding other evidence may have been adduced in direct conflict therewith. This question is fully discussed, and the authorities touching it examined, in *Huber v. Miller*, 41 Or. — (54 Cent. Law Jour. 429, 68 Pac. 400), with the result here stated. It is unnecessary, therefore, to examine the matter upon authority at this time.

The pivotal question of fact in the case was whether defendant had been negligent in the adjustment of the guard plate or rail intended for the protection of the operator in feeding fabrics to the mangle. It was its duty, as was said in the former opinion, to see that this guard plate was properly adjusted, because it was incumbent upon the company to furnish its servants and employes with a reasonably safe place to work in, and reasonably safe machinery, tools, and appliances to work with; and its liability depends upon whether it exercised reasonable care and precaution to guard against the danger of accident. The want of such care and precaution would be an act of negligence, and the question in the case at bar is resolved to the issue whether the defendant was remiss; that is, negligent in the proper adjustment of the plate. As there was evidence adduced by plaintiff sufficient upon which to carry the case to the jury, it devolved upon the defendant to show by competent testimony that it was not negligent in the particular complained of, and, if it had succeeded in this, it should have been exonerated. Plaintiff's evidence tended to show that this guard plate was adjusted an inch and a half above the table used in connection with the mangle, and that this was an improper and dangerous adjustment, and contributed to the in-

jury which plaintiff sustained. To overcome this testimony, defendant produced evidence showing that it purchased the mangle and had it set in place on the 2d or 3d of May, prior to the accident, which occurred on the 14th, that the manufacturer sent, with the machinery, at the special request of the defendant, a man skilled in its mechanism and workings, who set it up and adjusted it in every particular, and thoroughly instructed the managers of the defendant respecting the handling, adjusting, and management thereof, so that they were fully competent and qualified to have charge of and supervise its operation. It further gave evidence tending to show that the plate was adjusted by an agent at a height of three fourths of an inch above the table; that it was once removed by one of the managers at the request of some of the operators, but by the direction of another of the managers was carefully readjusted at the same place and in the same manner as placed by the agent of the company from which it purchased. Mr. Sherman, who did the adjusting, says it was put back in "exactly the same place." Mr. Tait, another of the managers, says it was put in "a similar position, in the same place."

Now counsel insist that, having availed itself of a skilled and competent machinist and expert to adjust the machinery, and having shown that the adjustment was in the same condition as placed by the expert when the accident occurred, it had exercised due care and precaution in the premises, and that the court should have held, as a matter of law, that it was not liable. If it be conceded that the procuring of the adjustment of the guard plate by a person properly skilled in the mechanism and operation of the machine, and the maintenance of the adjustment in the same place, was the exercise of reasonable care and precaution sufficient to exonerate the defendant from liability, the defendant is not yet extricated or absolved from the difficulty. The testimony adduced by the defendant was effective only to produce a conflict in the evidence as to the height of the rail at the time of the accident, and its own instrumentality in such adjustment. The evidence of the defendant was not such as the jury were bound to credit abso-

lutely, as against other testimony producing conviction in their minds. There had been a readjustment of the guard, and the simple inquiry might have been whether it had been replaced as adjusted in the first instance; and upon this there was a decided conflict of the evidence. Plaintiff's evidence has a strong tendency to refute this idea, while that of the defendant strongly supports it; so there was a question of fact most pertinent for the jury's determination. The real question, as we have said, was as to the height and proper adjustment of the guard rail at the time of the accident, and whether defendant's instrumentality in causing it to be in the position in which it was found at the time was an act of negligence in not exercising reasonable foresight and precaution; and of this the jury were the judges under the testimony, and not the court.

There were some instructions requested by defendant, which were refused, and it is urged that the trial court erred in not giving them to the jury. The chief ground upon which the error is predicated is that the general charge, to which no exceptions were saved, is not sufficiently explicit. After a careful examination of the situation, we are satisfied that the instructions given fully and intelligently stated the law applicable thereto, and the jury must certainly have understood them.

AFFIRMED.

Decided 7 April, 1902.

THIESSEN v. WORTHINGTON.

[68 Pac. 424.]

UNASCERTAINED BOUNDARIES—SETTLEMENT BY AGREEMENT.

Where the boundary line between adjoining proprietors is unascertained, and they agree on a division line, and take possession accordingly, and acquiesce therein, the line so agreed on is binding on the parties and their privies, and one of such owners, or his successor in interest, is entitled to a reformation of his deed so as to make the agreed line the boundary of his land.

From Clackamas: THOMAS A. McBRIDE, Judge.

Suit by Henry Thiessen against T. R. Worthington and others. From a decree for plaintiff, defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *L. L. Porter*, and *C. D. & D. C. Latourette*, with an oral argument by *Mr. Porter*, and *Mr. D. C. Latourette*.

For respondent there was a brief and an oral argument by *Mr. Algernon S. Dresser*, and *Mr. Edw. Mendenhall*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to reform a deed. The facts, in brief, are that in July, 1874, Wm. Atkinson and Thomas and Pilgrim Neil purchased 400 acres of land in Clackamas County under an agreement that Atkinson should take the title to the entire tract, and convey to the Neils the east half thereof. The land was accordingly deeded to Atkinson on the 8th, and on the next day, without any survey having been made, or any steps taken to ascertain the division line, Atkinson conveyed to the Neils what was supposed and intended to be the east half thereof. In the spring of 1876, at the instance of Atkinson and the Neils, the county surveyor established the division line, and it was understood and agreed that the line so located should constitute the true line dividing their respective premises. Very soon thereafter Thomas Neil sold and conveyed his interest in the east half to his brother, describing it in accordance with the description furnished by the surveyor. On October 3, 1879, Pilgrim Neil sold and conveyed the entire east half to the plaintiff by the description in his deed from Thomas. The division line as run by the county surveyor and agreed upon by the parties was about two rods west of the line called for in the deed from Atkinson to the Neils made in July, 1874, but after it had been established the respective parties occupied and lived up to it and recognized it as the true boundary line. In November, 1878, Atkinson sold his part of the land to Thomas Neil, but by mistake used the description furnished

by the scrivener who drew the deed from him to the Neils in July, 1874, instead of that furnished by the surveyor. On April 6, 1880, Thomas Neil sold to one James Wetzler, using in his conveyance the same description as in the deed to him from Atkinson, and Wetzler afterwards sold to the defendant according to the same description. The division line agreed upon was, however, recognized by all the owners of the property from Atkinson and the Neils down to the plaintiff and defendant, until some time in 1890, when a survey was made by another surveyor, and it was found that the boundary of the tract described in the deed from Atkinson to the Neils and in the deeds under which the defendant holds did not conform to the agreed division line, but was some two rods east thereof. The defendants thereupon brought an action against the plaintiff to recover possession of the tract between the two lines, and upon a trial the plaintiff was defeated, and thereupon brought this suit to correct the deeds so that they might conform to the agreed line. Plaintiff had a decree in his favor, and the defendants appeal.

The facts are practically undisputed. Atkinson and Thomas Neil, two of the original parties to the transaction, testify that it was the understanding and agreement that the line run by the county surveyor in 1876 should be the true division line between their premises, and the evidence shows beyond controversy that the respective owners thereafter occupied up to such line without question until the resurvey in 1890. It is familiar law that, while the title to land cannot be transferred by parol, an agreement made by proprietors of adjacent tracts settling a disputed boundary, or one that is uncertain or unascertained, is not within the statute of frauds, and, if followed by corresponding possession, is binding on the parties, not because it passes title, but because it determines the location of the estate of each, and places beyond future doubt the true line of separation between them: 4 Am. & Eng. Ency. Law (2 ed.), 859; Tyler, Boundaries, 254; Newell, Ejectment, p. 556, § 22; *Yates v. Shaw*, 24 Ill. 367; *Cutler v. Callison*, 72 Ill. 113; *City of Bloomington v. Bloomington Cemetery Assoc.* 126 Ill. 221 (18

N. E. 298); *Harn v. Smith*, 79 Tex. 310 (15 S. W. 240, 23 Am. St. Rep. 340). "This principle proceeds upon the ground," says Mr. Justice CRAIG in *Cutler v. Callison*, 72 Ill. 113, "not that title can pass by parol agreement, but that the extent of the ownership of the land of each has been agreed upon, settled, and finally determined (citing authorities). The courts always look with favor upon the adjustment of controverted matters of this character by agreement of the parties in interest; and when an agreement to establish a boundary line is fairly and clearly made, and possession of the land held according to the line so agreed upon, no reason is perceived why such agreement should not be conclusive." When a disputed, uncertain, or unascertained boundary is thus settled by agreement of the parties, and is followed by occupation in accordance therewith, it is not only binding upon the immediate parties to the contract, but on those claiming under them: *Pickett v. Nelson*, 71 Wis. 542 (37 N. W. 836); *Jacobs v. Moseley*, 91 Mo. 457 (4 S. W. 135); *Atchison v. Pease*, 96 Mo. 566 (10 S. W. 159). Within the doctrine of these cases the division line agreed upon by Atkinson and the Neils must be regarded as the true boundary line between the two tracts of land. It was a boundary uncertain and unascertained, and it was competent for the parties to locate it by parol; and such location, having been acquiesced in and recognized, is conclusive and binding upon the parties and their successors in interest.

A contention is made on behalf of the defendant that the purpose of the survey by the county surveyor in 1876 was not so much to locate the boundary as to ascertain the line dividing the tract into two equal parts, and there are some statements in the testimony of Atkinson and the Neils which, taken by themselves, lend color to such contention; but when testifying directly as to the purpose of the survey and the agreement of the parties they state positively that it was understood and intended at the time that the line so run and marked on the ground should be the true division line, and should mark the boundaries of the two tracts of land. Having been so established and acquiesced in for at least fourteen years, it ought

not now to be disturbed; for, as said by the Supreme Court of Illinois in a somewhat similar case: "Many of the most skilled and experienced surveyors differ more or less in determining where they (lines) were located. Lines and corners that are supposed to be fixed and established by one surveyor are overturned or left in doubt by another at a subsequent period. In all matters of uncertainty and dispute the parties may, without doubt, compromise, and end the dispute. And they may as certainly fix, by agreement, the boundary lines separating their lands as other disputes. And when they have thus agreed upon the position of such boundary, and have acted upon it as the true line, they should be estopped from asserting another and different line": *Yates v. Shaw*, 24 Ill. 367. From these views it follows that the decree of the court below should be affirmed, and it is so ordered.

AFFIRMED.

Decided 7 April, 1902.

HOWARD v. CLATSOP COUNTY.

[68 Pac. 425.]

FEES—DISTRICT ATTORNEY—DIVORCE—STATUTES.

Since the act of 1899, placing district attorneys on a salary and cutting off all fees and compensation except their salaries (which does not apply to Multnomah County), the district attorney fee in divorce cases required by Section 1074 of Hill's Ann. Laws, need not be paid, as the later act (Laws, 1899, pp. 184, 185, § 3), repeals section 1074 by implication in its application to all counties except Multnomah.

From Clatsop: **THOMAS A. McBRIDE**, Judge.

Action by Sam Howard against Clatsop County, resulting in a judgment for defendant on a demurrer to the complaint.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Claude Strahan* and *Mr. Waldemar Seton*.

For respondent there was a brief and an oral argument by *Mr. Harrison Allen*, District Attorney.

MR. JUSTICE WOLVERTON delivered the opinion.

The plaintiff was required, as a condition to the commencement of a suit for divorce, to pay to the clerk of Clatsop County a fee of \$10. This sum he now seeks to recover as an unlawful exaction, and the single question presented is whether the district attorney or the county is now entitled to such fee. Under Section 1074, Hill's Ann. Laws, the plaintiff in every divorce suit is required to deposit \$10 with the clerk of the court in which the suit is instituted, which must be paid to the district attorney as his fee in such suit, when allowed by the court. This fee, as determined in *State ex rel. v. Moore*, 37 Or. 536 (62 Pac. 26), is to be collected by the clerk from private parties for services rendered by the district attorney, and as a part of his compensation. In 1898 an act was passed to regulate and fix the compensation of the district attorney in the Fourth Judicial District, wherein he was allowed \$3,500 per annum, in addition to the yearly salary of \$500, in full compensation for services rendered by him: Laws 1898, p. 7. It was also provided (section 2) that he should receive no other salary, fees, percentages, or compensation of any kind, and by section 8 that the fees, percentages, commissions, and charges now established by law, or in any manner allowed, for the performance of any act or duty by or required of the district attorney (except for services rendered for or on behalf of the state or Multnomah County, for which no charge shall be made), shall continue and remain the established fees, percentages, etc., for such an act or duty, which are required to be collected and paid over to the county treasurer. Under this act it was held (*State ex rel. v. Moore*, 37 Or. 536, 62 Pac. 26), that a party instituting a suit in Multnomah County for divorce was still required to pay the fee of \$10, as a condition to filing a complaint, but for the use of the county. The act is local in its operation, and applies to Multnomah County only, as it composes the Fourth Judicial District. In 1899 the legislature passed a general act (Laws, 1899, p. 184,) amendatory of sections 2301 and 2304, Hill's Ann. Laws, extending the term of office of the district attorneys, in the sev-

eral judicial districts, from two to four years, and fixing their salaries. By section 3 it is provided that no salary, fees, percentages, or compensation of any kind shall be allowed or received by them, except as therein provided, and section 5 repeals all acts, or parts of acts, in conflict therewith. The act contains no clause or provision corresponding to section 8 in the act of 1898, continuing in force the established fees, percentages, commissions, and charges for the acts or duties of the district attorney, and this is wherein the two acts differ, and distinguishes this case from *State ex rel. v. Moore*. The \$10 fee required to be collected from a private party, under section 1074, being one to which the district attorney was entitled, as a perquisite for a duty performed by him, the act of 1899 putting him upon a salary, and expressly denying to him any further salary, fees, etc., must be held to supersede, and thereby to repeal, section 1074 as to such fee in judicial districts other than the Fourth, as the two provisions are utterly inconsistent, one with the other, and both cannot stand. Plaintiff is entitled, therefore, upon the face of his complaint, to recover from the county, and the demurrer should have been overruled. The judgment of the trial court will therefore be reversed, and the cause remanded with directions to overrule the demurrer; and it is so ordered. REVERSED.

Decided 30 June, 1902; rehearing denied.

SIMMONS v. OREGON RAILROAD COMPANY.

[60 Pac. 440, 1022.]

CARRIERS—PASSENGER—PAYMENT OF FARE.

1. The payment of a consideration or the possession of a ticket or pass is not necessary to the creation of the relationship of passenger and carrier, so far as relates to an injury received by one who is on a train.

CARRIERS—LIABILITY FOR INJURY RECEIVED ON SPECIAL FREIGHT.

2. Where a railroad company allows passengers to ride on regular freight trains, but not on "extras," and a person in good faith boards a train in fact an "extra," but in all appearances similar to a regular freight, and is allowed by the conductor to ride thereon, he is to be regarded as a passenger to whom the company is liable as a carrier for injuries received while on such train.

LIABILITY FOR INJURY TO EMPLOYEE TRAVELING WHILE NOT ON DUTY.

3. An employe of a carrier traveling free because of his employment, either with or without a pass, when his time is his own, and he is occupied with his private business, is a passenger, and entitled to recover for damages caused by the negligence of the carrier's servants; under such circumstances the traveler is not a fellow servant with the careless employes.

CARRIERS—APPARENT AUTHORITY OF CONDUCTOR OF A SPECIAL FREIGHT.

4. Where a carrier is in the habit of carrying passengers on its freight trains under certain conditions and restrictions, a conductor of such a train is acting within the limit of his apparent authority when he permits a person to board the train and ride thereon, though he really violates the rules in so doing, and the carrier will be liable to such a person, as a passenger, for an injury resulting from the negligence of the train operatives.

CARRIERS—DUTY TO STOP AT SAFE PLACE.

5. A carrier owes a passenger the duty of stopping its train at a place where he can, in the exercise of reasonable care, alight with safety; and it is not enough to stop at a place not suitable for him to alight, but convenient for its employes to do their work.

MATERIAL AND IMMATERIAL EVIDENCE.

6. Testimony of the conductor of a train on which a passenger was injured that he thought such passenger had alighted is immaterial; it appearing that he would not have done differently if he had known he was aboard, and that the accident occurred through failure of the engineer to obey signals.

CROSS EXAMINATION—HARMLESS ERROR.

7. Cross-examination is intended to develop more fully matters testified to on direct examination, and will not be permitted to extend to other questions; but error in this respect will not be cause for reversal where the same witness is afterward called by the cross-examining party, for then an opportunity has been afforded to develop at length the questions excluded before.

From Umatilla: WILLIAM R. ELLIS, Judge.

Action by G. D. Simmons against the Oregon Railroad & Navigation Co., to recover damages for injuries received in a collision on defendant's road. There was a verdict and judgment for plaintiff for \$20,700, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Cotton, Teal & Minor* and *Carter & Raley*, with an oral argument by *Mr. William W. Cotton*.

For respondent there was a brief and an oral argument by *Mr. Thomas G. Hailey* and *Mr. Alfred S. Bennett*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for personal injuries suffered by the plaintiff through the negligence of the operators of a train upon which he was riding. For some eighteen months prior to the accident he had been employed by the defendant company as a fireman on one of its helper engines at Kamela, a station on the summit of the Blue Mountains. He was paid by the "run," receiving no compensation when not at work. Under his contract of employment the company reserved from each check issued to him for wages forty cents as a hospital fee, in consideration of which it agreed, in case of illness or injury, to provide him with medical services and medicine free, and, as the testimony tended to show, to transport him to and from points on the road where the company provided medical attendance for its employes. On the 17th of May, 1900, being indisposed, he obtained a "lay-off," in order to go to La Grande, a station some 20 miles east of Kamela, to consult the company's physician and obtain medical service. He rode to La Grande on one of the company's trains, without a ticket or pass, and without paying fare, or having his right to travel in this manner questioned. After consulting the physician and transacting some other business in La Grande, he went to the depot, and got aboard the caboose car of what he then supposed was a regular freight train, but which, as a matter of fact, was an extra, although there was nothing in its outward appearance to indicate any difference between it and a regular freight. It was made up as were regular freight trains, and had attached to it a caboose car, fitted up for carrying passengers, like those used by the company on regular freight trains. The conductor was in the car when the plaintiff went aboard, inquired of him where he was going, and the plaintiff told him he was going home. Plaintiff paid no fare, none was demanded of him, nor had he any written evidence of his right to ride, yet the conductor allowed him to do so. When the train reached Kamela, in the course of the work required at that station it became necessary to detach the ca-

boose and rear helper engine from the remainder of the train, and leave them standing on the track until the rest of the train was pulled west beyond the west switch, the purpose being to pick up a nonair car from the west spur, and attach it to the train. In order to do this, it was intended that the rear helper engine should take the caboose, go in on the spur track, pick up the car, and bring it out on the main track, and attach it to the train. When, however, the engine with the caboose reached the west switch, instead of stopping, as it should have done, it was permitted, through the negligence and carelessness of the train employes, to move west on the main track until a collision occurred between the caboose and the main train, thereby severely and permanently injuring the plaintiff, who was then in the caboose.

The rules of the company in force at the time provided that every person riding on its trains must present a ticket or pass or pay fare for each trip, and that conductors must not carry passengers or employes without tickets or passes. Rule 243 provided that "Freight trains will not carry passengers, except as designated in the special rules. Trains so designated will carry employes with passes, and passengers when provided with proper transportation as required by the rules. Employes with passes may be carried on all freight trains between stations at which trains stop." The special rule governing the carrying of passengers on freight trains was as follows: "Passengers presenting permit Form 208, accompanied by proper transportation, may be carried by regular freight trains between points (at) which they stop, subject to rules 218 and 243." Form 208, referred to, contained a written contract, wherein the person accepting the same agreed that the railroad company, in the operation of its freight trains should not be deemed a common carrier of passengers, and should not be liable to the holder as such common carrier. The plaintiff, however, had no knowledge of these rules or requirements, or of the conditions under which the defendant carried passengers on its freight trains. His work was in another department, and he was not called upon, nor was it necessary for him, to

familiarize himself with the rules governing the company's transportation business. About the 1st of January, 1900, the defendant issued and delivered to the division engine foreman at La Grande an employe's pass, No. E17, for "one fireman," good between Kamela and La Grande, which the foreman was authorized to deliver to any fireman that the company might wish to transport between the stations named. In addition to this, such foreman had blank trip passes, which he was authorized to issue to employes going over the road. Employes of the company, however, when known to the conductors, were commonly permitted to travel without a pass or other written evidence of their right to transportation. Plaintiff knew of the existence of pass No. E17, and had used it on one or two occasions, but generally rode without it, and had been told by the person having it in charge that it was not necessary for him to procure it, as he was an "old man," and therefore known to the conductors on the road. The trial resulted in a verdict and judgment in favor of the plaintiff, and the defendant appeals.

There are numerous assignments of error referred to and discussed in the briefs, but they are all grounded, substantially, upon the contention that the relation of passenger and carrier did not exist between the plaintiff and defendant at the time of the injury, and that the defendant was, therefore, not liable to him for an injury received through the negligence of the train operatives. The question thus presented naturally divides itself into two special subjects of inquiry: *first*, whether the conductor of the train upon which the plaintiff was riding had apparent authority to accept him as a passenger, and to create the relationship of passenger and carrier between him and the defendant; and, *second*, if so, whether he is to be regarded as a passenger or an employe at the time of the injury.

1. A passenger is sometimes defined to be a person whom a railway company, in the performance of its duty as a common carrier, has contracted to carry from one place to another, for a valuable consideration, and whom the company, in the performance of the contract, has received at its station, or in its car, or under its care: Patterson, Ry. Acc. Law, § 210.

But the payment of fare or of a consideration for the carriage is not necessary to create that relationship, so far as it is involved in an action for a personal injury received while on the train. Where a person goes aboard a railway train in good faith for the purpose of being carried from one place to another, and is permitted by the conductor to ride, the company is liable, in the absence of a special contract, for an injury arising from the carrier's negligence, if the conductor was expressly or impliedly authorized to bind the company by such permission, even though such person was traveling gratuitously, and the conductor had violated his instructions by allowing him to remain on the train: 2 *Shearman & Redfield*, Neg. (4 ed.) § 491; *Beach*, Contrib. Neg. (3 ed.) § 165; 2 *Wood*, Railroads (Minor's ed.), 1207; *Washburn v. Nashville R. Co.* 3 Head, 638 (75 Am. Dec. 784); *Wilton v. Middlesex R. Co.* 107 Mass. 108 (9 Am. Rep. 11); *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Brennan v. Fairhaven & W. R. Co.* 45 Conn. 284 (29 Am. Rep. 679); *Louisville & N. R. Co. v. Scott's Adm'r* (Ky.), 56 S. W. 674 (50 L. R. A. 381); *Waterbury v. New York Cent. & H. R. R. Co.* (C. C.) 17 Fed. 674, note. The fact, therefore, that the plaintiff was being carried gratuitously is immaterial, if the company accepted him as a passenger, and expressly or impliedly agreed to transport him as such. Nor do we regard as material the question of his inherent right to ride, or whether he should have had a pass or other written evidence of his right to transportation. He was lawfully on the train for the purpose of being carried home, with the consent and by the permission of the conductor. If the conductor had authority to bind the company by allowing him to ride on the train, the relation of passenger and carrier was thus created between him and the company, regardless of the question whether he could have been lawfully ejected from the train or denied the right to ride thereon, unless he is to be regarded as an employe, instead of a passenger.

2. This brings us to the inquiry whether the conductor of the train upon which plaintiff was riding had authority, real or apparent, to create the relation of passenger and carrier be-

tween the company and one riding upon his train. A railway company may separate its passenger and freight business, providing certain trains in which people may be carried as passengers, and other trains devoted exclusively to the transportation of freight. In case of such a complete separation between its freight and passenger business, the conductor of a freight train has no implied authority to receive passengers thereon, or to bind the company by his act in so doing. And, again, where one gets on a train made up exclusively of cars appropriate alone to the carrying of freight, he is, under many of the authorities, bound to take notice that such train is not intended for passengers, and, if he rides thereon, even with the consent and approval of the conductor, he is not entitled to the rights of a passenger, nor is the company bound to exercise toward him the same degree of care that would be required of it toward a passenger lawfully traveling on one of its trains: 4 Elliott, Railroads, § 1582; Patterson, Ry. Acc. Law, § 215; *Eaton v. Delaware St. R. Co.* 57 N. Y. 382 (15 Am. Rep. 513); *Powers v. Boston & M. R. Co.* 153 Mass. 188 (26 N. E. 446); *Texas & Pac. Ry. Co. v. Black*, 87 Tex. 160 (27 S. W. 118); *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477 (33 Pac. 185, 20 L. R. A. 822); *San Antonio, etc. Ry. Co. v. Lynch*, 8 Tex. Civ. App. 513 (28 S. W. 252); *St. Louis, etc. Ry. Co. v. White* (Tex. Civ. App.), 34 S. W. 1042; *San Antonio, etc. Ry. Co. v. Lynch* (Tex. Civ. App.), 40 S. W. 633. Where, however, freight and passenger business is not entirely separated, but a railway company carries passengers on some of its freight trains under certain terms and conditions, one who, without knowledge of the company's regulations to the contrary, gets in a car attached to a freight train, designed and prepared for carrying passengers, and is allowed by the conductor to ride therein, is to be regarded as a passenger, and entitled to recover for an injury received through the company's negligence, even though the conductor may have been prohibited by the rules of the company from carrying passengers on that particular train: Schouler, Bailm. 598; Thompson, Carriers, 344; *Dunn v. Grand Trunk Ry. Co.* 58 Me. 187 (4 Am. Rep.

267); *Lucas v. Milwaukee & St. P. Ry. Co.* 33 Wis. 41 (14 Am. Rep. 735); *Everett v. Oregon S. L. Ry. Co.* 9 Utah, 340 (34 Pac. 289); *Whitehead v. St. Louis, I. M. & S. Ry. Co.* 99 Mo. 263 (11 S. W. 751, 6 L. R. A. 409); *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185 (10 Pac. 461); *Spence v. Chicago R. I. & P. Ry. Co.* (Iowa) 90 N. W. 346.

In *Dunn v. Grand Trunk Ry. Co.* 58 Me. 187 (4 Am. Rep. 267), a person entered a saloon car attached to a freight train, and was permitted by the conductor to ride. By a rule of the company, passengers were not allowed to travel on freight trains over a specified portion of its line, and no passengers were to be carried in cars attached to freight trains, "without written authority from the superintendent." It was held that he was lawfully on the train, and that the company was liable for an injury he received through its negligence. The opinion was delivered by Mr. Chief Justice APPLETON, and is a strong and learned exposition of the law upon this subject. In discussing the authority of the conductor and the effect of the rules of the company, he says: "The plaintiff went aboard the freight train, in the saloon car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. * * If, not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object. The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their con-

duct while in its employ. It alone has the right and the power of removal." And, again: "The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation."

In *Lucas v. Milwaukee & St. P. Ry. Co.* 33 Wis. 41 (14 Am. Rep. 735), the company did not carry passengers on its through freight trains, but its way freight trains were allowed to carry them. The plaintiff went aboard a through freight train in good faith, and with the knowledge and consent of the conductor, supposing it to be one of those that carried passengers. It was held that, as there was nothing in the situation or condition of the train to indicate that passengers were not carried upon it as well as upon other freight trains, he was entitled to the rights of a passenger in respect to an injury received by him while on board the train. In discussing the question as to whether the plaintiff was bound by the rules of the company and the instructions to the conductor not to take passengers on his train, Mr. Justice LYON, speaking for the court, says: "Before the defendant used any portion of its freight trains as passenger trains also, and while the functions of the two were kept entirely separate and distinct, the one being used for the carriage of passengers and the other exclusively for the transportation of merchandise, a person riding upon a freight train without express authority from some person competent to give it would probably have been unlawfully on the train, and could not have successfully claimed and enforced the rights of a passenger against the defendant. But since the defendant has authorized the carriage of passengers upon some of its freight trains, it seems very clear to my mind that a different rule must be applied. I think that since the system of carrying passengers on freight trains was adopted by the defendant, a person who goes upon a freight train in

good faith, supposing it to be also a train for carrying passengers, is entitled to all the rights and remedies of a passenger as against the company, at least until he is informed that he has mistaken the character of the train." And, again: "The conductor of the train in question was the general agent of the defendant for the purposes of operating that train. As between himself and his employer, he had no authority to receive passengers upon it. Such want of authority, however, was not known to the plaintiff, or those in charge of him. They knew that conductors of other freight trains were authorized to receive and did receive passengers on their trains, and believed, as they well might, that the conductor with whom they were about to take passage had the same authority. Whatever the rule might be were no freight trains of the defendant permitted to carry passengers, it must be held, under the circumstances of this case, that if such conductor directed the plaintiff to go on board the train, and the plaintiff did so, he thereby became a passenger of the defendant, notwithstanding the conductor exceeded his authority. In other words, such direction, if given, was within the scope of the conductor's employment, and binding upon the defendant, although unauthorized."

In *Everett v. Oregon S. L. Ry. Co.* 9 Utah, 340 (34 Pac. 289), a section hand was injured while riding on an extra freight train by authority of the conductor. Under the rules of the company passengers could be carried on regular, but not on extra, freight trains. It was held that, as he went aboard the train in good faith, believing he had a right to ride, and was allowed to do so by the conductor, the company was liable to him as a passenger, although the train was one that under the rules of the company was not allowed to carry passengers. In speaking of his rights and of the duties of the conductor, the court say: "He was there (in the caboose car) with the knowledge of the conductor who had charge of the train. If this was an extra train, on which passengers were not allowed to ride, it was the conductor's duty to inform him, and request him to leave, in accordance with the regulations of the defendant; and, if plaintiff had disregarded such request, the con-

ductor could have lawfully removed him, using no more force than was necessary for that purpose. If the conductor failed to do this, it must be presumed that the plaintiff was rightfully there. A railroad company has a right to designate which of its freight trains shall carry passengers and which shall not. It has a right to make regulations, and, when so made, they are binding on its servants. Those riding on its trains are not presumed to know them. If its servants neglect or violate them, and because of such neglect or violation injury results to strangers, the company will be liable." In *Whitehead v. St. Louis, I. M. & S. Ry. Co.* 99 Mo. 263 (6 L. R. A. 409, 11 S. W. 751), a lad fourteen years of age was invited by a brakeman and permitted by the conductor of a special through freight train to ride free thereon, and while so riding was injured. Under the rules of the company, passengers were permitted to be carried on local freight trains, but not on special through trains. It was held, however, that the company was liable for the injury received by the boy through the negligence of the operators of the train. In the course of the opinion it is said: "The evidence shows that defendant carried passengers for hire on its local freight trains but not on through freight trains. The train in question was a special through train. The rules of defendant forbade the carriage of passengers on this and like through trains. There is nothing in the outward appearance of the cars or caboose to indicate any difference between through and local freight trains, though the latter are designated on time cards displayed at stations." And, again: "Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it, either with or without the payment of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty towards his master, but that is a matter of no consequence here. To all outward appearances,

as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority to permit the boy to ride on the train."

In *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185 (10 Pac. 461), a boy was injured while riding without the payment of fare in the caboose of a construction train, by the invitation of the conductor, but against the rules of the company. It was held that the company was liable, although under its rules the conductor was instructed not to permit passengers to ride upon his train. The court say: "It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company, for two reasons: *first*, that the conductor had instructions not to carry passengers on the construction train; and, *second*, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instructions. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employe, the argument made by counsel might apply."

Under the doctrine of these cases it was within the apparent authority of the conductor of the train upon which the plaintiff was riding at the time of his injury to allow persons to ride thereon, and thereby to create the relation of passenger and

carrier between such persons and the company. The rules of the company permitted the carrying of passengers upon some freight trains, and under certain conditions. It is true that under these rules the defendant may not have been a common carrier of passengers on any of its freight trains, in the sense that one had a lawful right to ride there without complying with the conditions imposed. Nor were such conditions and limitations illegal or void. But, nevertheless, the company did assume to carry such passengers as complied with its rules on certain of its freight trains. It was the duty of the conductors of its trains to enforce these rules. For that purpose they stood in the place and as the representatives of the company, and by their acts the company is bound. The rules regulating the carrying of passengers on freight trains were unknown to the plaintiff. He had no knowledge of their existence, and did not know, when he entered the train, that he was violating them. He entered the car in good faith, supposing it to be one in which passengers were allowed to ride, and was permitted by the conductor to remain therein. He therefore, under the law, became a passenger, and entitled to the rights of such, even if he paid no fare, unless the fact that he was an employe of the company would change that relationship.

3. This brings us to the other inquiry. There are many authorities holding, and it may for the purpose of this case be conceded, that an employe of a railway company, traveling free, as a part of his contract of service, to and from his work, or in immediate connection with his employment, is not a passenger, but an employe, and a fellow-servant with those in charge of the train: *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267 (47 Am. Rep. 36); *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Seaver v. Boston & M. R.* 14 Gray, 466; *Gilman v. Eastern R. Corp.* 10 Allen, 233 (87 Am. Dec. 635); *Ryan v. Cumberland Val. R. Co.* 23 Pa. 384; *McNulty v. Pennsylvania R. Co.* 182 Pa. 479 (38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721); *Ionnone v. New York, N. H. etc. R. Co.* 21 R. I. 452 (79 Am. St. Rep. 812, 44 Atl. 592, 46 L. R. A.

730); *Higgins v. Hannibal & St. J. R. Co.* 36 Mo. 418. But, where an employe is traveling on his own private business, when his time is his own, even though he travels on a pass or ticket received on account of his employment, or is permitted to travel without a pass or ticket by reason of his employment, he is a passenger, and not a servant: *Doyle v. Fitchburg R. Co.* 162 Mass. 66 (37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335); *Dickinson v. West End St. Ry. Co.* 177 Mass. 365 (83 Am. St. Rep. 284, 59 N. E. 60); *State to use v. Western Maryland R. Co.* 63 Md. 433; *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9 (81 Am. Dec. 336); *Denver, etc. Rapid Transit Co. v. Dwyer*, 20 Colo. 132 (36 Pac. 1106); *Williams v. Oregon S. L. Ry. Co.* 18 Utah, 210 (54 Pac. 991, 72 Am. St. Rep. 777); *O'Donnell v. Alleghany Val. R. Co.* 59 Pa. 239 (98 Am. Dec. 336); *McNulty v. Pennsylvania R. Co.* 182 Pa. 479 (38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721); *Whitney v. New York, N. H. etc. R. Co.* 102 Fed. 850 (43 C. C. A. 19, 50 L. R. A. 615); *Rosenbaum v. St. Paul & Duluth R. Co.* 38 Minn. 173 (36 N. W. 447, 8 Am. St. Rep. 653); *Washburn v. Nashville R. Co.* 3 Head, 638 (75 Am. Dec. 784); *Louisville & Nashville R. Co. v. Scott's Adm'r*, 22 Ky. Law Rep. 30 (56 S. W. 674, 50 L. R. A. 381); *Chattanooga Rapid-Transit Co. v. Venable*, 105 Tenn. 460 (58 S. W. 861, 51 L. R. A. 886).

The distinction between the two classes of cases is aptly illustrated by the Massachusetts decisions referred to. In the *Gillshannon*, *Seaver*, and *Gilman* cases cited by the defendant, the injured party at the time he received the injury was being transported in immediate connection with and as a part of his employment, while in the *Doyle* and *Dickinson* Cases, cited by the plaintiff, he was traveling on his own business, although with the permission of the company, or on transportation obtained from it, as an incident to and part compensation for his services. In the *Doyle* Case the plaintiff's intestate, who lived some distance out of Boston, was employed in the freight department of the defendant in that city, at a daily wage. Each month he was furnished by the company, as a part of his compensation, with a ticket, good for sixty-two rides be-

tween his home and Boston during the period for which it was issued. He was entitled to ride on this ticket whether he was going to or from his work or traveling solely for his own private interests or pleasure. One evening while returning home from a business or pleasure trip to Boston, he was killed through the negligence of the defendant. The court held, distinguishing the case from some earlier decisions, that he was a passenger, and not an employe. In the Dickinson Case the plaintiff was an employe of a street railway company. By a rule of the company all employes in uniform were entitled to ride at any time free. After the plaintiff had finished his work for the morning of a certain day, he got aboard one of the cars of the defendant for the purpose of going to his dinner, and while riding in such car was injured. It was held that, although he was an employe, riding free under a rule of the company, he was nevertheless to be regarded as a passenger at the time of his injury, the same as those who had paid fare. Now, under this doctrine, it is apparent that the plaintiff cannot be regarded as a servant or employe of the company at the time of his injury. He had on the previous day received a lay-off and was not engaged in the service or on the business of the company at the time of the accident. It is true he was returning home, expecting to go to work the next day; but, nevertheless, on the day in question his time was his own, and he owed the defendant no duty until he actually resumed his work. He was not travelling to or from his work, or in immediate connection with it. It was no part of his duty as a servant of the defendant to take the train on which he was riding for the purpose of resuming his employment, or in the performance of any duty he owed the company. Under his contract of employment, he was paid by the run, and received no compensation when not at work; so that at the time he was injured he was not in the service of the company, and was receiving no wages or compensation from it. We are of the opinion, therefore, upon the law and the facts, that the conductor of the train upon which the plaintiff was riding had ap-

parent authority to receive him thereon as a passenger, and that he must be regarded as a passenger. The judgment of the court below is affirmed. **AFFIRMED.**

Decided 25 August, 1902.

ON PETITION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

4. The point is earnestly pressed that because, under the rules of the defendant, passengers were carried on freight trains only on the conditions and limitations set forth in Form No. 208, the conductors of such trains had no authority, real or apparent, to bind the company by receiving any person on their trains as a passenger save on the conditions named; in other words, the effect of the argument, as we understand it, is that the limitations on the authority of the conductor are binding on all persons riding on his train, whether known to them or not. Such a doctrine is, in our opinion, opposed to the authorities, and contrary to the rules governing the relation of principal and agent. It is common learning that a principal is bound, not only by the acts of his agent within the actual authority conferred upon him, but within his apparent authority, and that he cannot hold one out to the world as possessing authority over a given subject, and deny liability for his acts by relying upon some secret instructions not known to persons dealing with him. When, therefore, the defendant permitted and allowed persons to be carried on its freight trains at all, and under any conditions, as part of its general business, it necessarily invested the conductor of such train with authority to pass upon the question of whether one applying to ride should be allowed to do so, and to determine who should and who should not ride thereon. For that purpose, he stood in the place of the company, as its agent, and had authority to act for it. He was an agent invested with actual authority to receive and carry persons on his train on certain conditions, and if he violated his instructions, and carried unauthorized persons ignorant of the limitations on his authority, the com-

pany is, nevertheless, liable for an injury received by them through the negligence of the operators of the train. Counsel argues that a person riding on a freight train in pursuance of the rules, and under contract with the company, is not a passenger, and therefore defendant is not a carrier of passengers on such trains, and as a consequence the conductors thereof have no authority, actual or apparent, to receive persons in that capacity, or bind the company by so doing. The rules of defendant providing for and regulating the carriage of persons on freight trains designate them as "passengers," and, we think, manifestly properly so. Generally speaking, a passenger is one who travels in a public conveyance, by virtue of a contract, express or implied, with the carrier; and a carrier of passengers is one who undertakes to carry persons from place to place gratuitously, or for hire: 5 Am. & Eng. Ency. Law (2 ed.), 480. It is obvious that in this sense a person riding on a freight train of defendant, in pursuance of its rules and by its consent is a passenger. It is true he may be a passenger with restricted rights, as against the company, because of the terms of the contract under which he is being carried, but he is none the less a passenger. He is not a licensee, trespasser, servant, or employe of the company, but a passenger, and entitled to all the rights of such, except as restricted by the terms of his contract, and the character of the train upon which he is riding. It is, therefore, within the general scope of the employment of the conductor of a freight train, under the rules of the company, to receive and carry passengers thereon, and we must adhere to the view heretofore expressed, that his act in so doing is binding on the company, although he may have violated his instructions or its rules and regulations.

We do not deem it necessary to go with counsel through an exhaustive and critical review of the authorities, but since so much reliance seems to be put on *Powers v. Boston & M. R. Co.* 153 Mass. 188 (26 N. E. 446), it is well to observe that in that case defendant was not carrying persons on its freight trains as a business. Moreover, the plaintiff, who had formerly been

employed by the defendant, had received and receipted for books containing the rules of the company, and at the time of his injury was riding in a car "which he could not have failed to know was not intended or adapted for the use of passengers, but solely for the accommodation of the defendant's employes engaged in the operation of its trains," which fact of itself, was sufficient, under many of the decisions, to charge him with knowledge of the limitations on the authority of the conductor. In the case at bar, on the other hand, defendant assumed to carry on its freight trains all persons who complied with certain conditions, as a part of its general transportation business; and the car in which defendant was riding at the time of his injury was fitted up for the carriage of passengers, and was such as the defendant used on its regular freight trains for that purpose. It is therefore distinguishable from the Powers and all other similar cases, and, in our opinion, is in principle the same as the Lucas, Everett, Spence, and other cases cited.

5. There are several assignments of error not particularly noticed in the opinion, although substantially covered by it, to which our attention is again called. It is said the court erred in modifying the instruction requested by the defendant, to the effect that if at Kamela the train was stopped at the proper place to enable the employes to do their work, and while so stopped the plaintiff had ample time and a reasonable opportunity to leave the train, but failed to do so, he could not recover, by inserting after the word "time" the words "suitable and safe place." There was no error in this. If the plaintiff was a passenger, or entitled to the rights of such, whether in the full sense of that term or not, the company owed him the duty of stopping the train at a place where he could, in the exercise of reasonable care, alight with safety; and this duty was not discharged by stopping at a place convenient for the employes to do their work, and giving him time to leave the train there, unless it was a suitable place for him to do so.

6. Again, it is urged that the court erred in not allowing

the conductor of the train to state what his belief was as to whether plaintiff was aboard when the caboose passed the station going west. The conductor's belief upon this subject had no bearing upon the question of the negligence charged or the plaintiff's rights. The conductor testified that the accident occurred through the failure of the engineer to observe or obey signals, and that, even if he had known the plaintiff was on the car, he would not have stopped it at the station to permit him to alight, because it was not customary to do so. His belief, therefore, did not affect his conduct, and was wholly immaterial.

7. Error is also predicated on the fact that the court would not permit the defendant, on the cross-examination of the conductor, to show, as it made an offer to do, that before the train left La Grande plaintiff applied to him for permission to ride, and was told that he could not do so unless he had a permit or pass; and that afterwards the plaintiff was asked for transportation, and, as he had none, was told that he must get off at Hilgard, a station east of Kamela. The witness' testimony in chief was confined to what occurred at Kamela, and to the fact that the last time he saw plaintiff was about 2½ miles east thereof, when he woke him up, and told him the train was approaching the station. Nothing was said by him as to how plaintiff came to be aboard the train, or by what authority he was riding thereon, or what occurred at La Grande, and therefore the testimony sought to be elicited by the cross-examination was not so intimately connected with the examination in chief as to make the ruling of the court error. If the offer to prove was true, the testimony would no doubt have been very material, but it was a part of defendant's case in chief, and could not be made out on the cross-examination of plaintiff's witness. The defendant subsequently called the conductor as its own witness, and examined him at length, but, as no such proof was made or offered, the ruling on this question of cross-examination, even if it had been error, would hardly justify a reversal of the judgment.

REHEARING DENIED.

Argued 18 March; decided 14 April, 1902.

STARR v. KAISER.

[68 Pac. 521.]

DEED AS A MORTGAGE—FRAUDULENT CONVEYANCE.

1. A quit claim deed executed by a husband, in which his wife joined without knowing the nature of the instrument, was given as security for the payment of a debt. It was agreed between the husband, the creditor, and the grantee that the property should be sold when the husband desired it, and the debt paid. The property was conveyed by the grantee, pursuant to the direction of the husband, and upon the payment of the debt. The grantee in the second conveyance did not enter into possession of the premises. The latter deed recited a nominal consideration, and the evidence did not disclose what amount, if any, was paid for the premises. *Held*, that the second conveyance was fraudulent as against the wife, who subsequently purchased the premises at execution sale under a judgment against the husband for separate maintenance.

FRAUDULENT CONVEYANCE—GOOD FAITH OF GRANTEE.

2. A grantee in a conveyance from a husband, pending a suit against him by his wife for separate allowance, who had knowledge of the pendency of the action, and who accepted the conveyance without the wife joining therein, cannot claim the premises as an innocent purchaser.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Nannie N. Starr against Kate M. Kaiser and another. From a decree for plaintiff, defendant Kaiser appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. J. F. Boothe*.

For respondent there was a brief over the names of *John F. Logan*, and *Henry E. McGinn*, with an oral argument by *Mr. Logan*.

MR. JUSTICE WOLVERTON delivered the opinion.

On November 25, 1899, the plaintiff commenced a suit against William L. Starr, her husband, for separate support, and on February 20, 1900, obtained a decree against him for \$35 per month, dating from the commencement of the suit, and to continue while he remained separate and apart from her, or

until the further order of the court, which decree was docketed two days later. On July 14, 1899, Starr and plaintiff executed and delivered to the Associated Banking & Trust Co. a writing, in form a quitclaim deed to lots 5 and 6 in block 129, Caruthers Addition to Portland, hereinafter referred to as the "Home Property." This instrument was recorded on the 22d of September following, and on the same day the trust company quitclaimed said lots to Kate M. Kaiser, reciting a consideration of \$1 therefor; and on January 26, 1900, Starr executed and delivered to Mrs. Kaiser a deed to lot 15, block 1, Greenridge Addition to Portland, reciting a consideration of \$50, he being the owner of both these pieces of property prior to the attempted transfers. On August 21, 1900, execution was issued on the decree, by virtue of which all of Starr's right, title, and interest in and to the home property were sold; the plaintiff becoming the purchaser at such sale, which was thereafter confirmed. She was in possession at the time, and, continuing therein, Kaiser commenced an action in ejectment, and to this a cross bill was filed by plaintiff, Starr being made a co-defendant and brought into the suit; and thus are presented the matters for our present inquiry. The object of the cross bill is to set aside these deeds as fraudulent and void,—the first as a cloud upon plaintiff's title acquired under the execution, and both as a hindrance to the enforcement of her decree for support.

With reference to the deed executed to the trust company, the plaintiff testifies that she signed it, but did not know at the time what it was; that at the same time she executed a deed with her husband to other property; that she continued in the possession of the house,—had a key thereto,—and came and went as she pleased; that on the day she signed the deed she received from her husband \$100, which she intended to use on a trip to California; that on the next day, she and her husband having had some trouble, he told her that she need not come back, as he had sold the place, which was the first information she had that they had deeded the property, and she at once tried to get it restored, but was unsuccessful; and that at an-

other time Starr told her that he had mortgaged the property to the trust company to secure his attorney's fees.

Judge Pipes testifies that Starr owed him a fee for legal services, to secure the payment of which he made a quitclaim deed to the home property in favor of the trust company; that the fee, amounting to \$375, or near that, was afterwards paid, being about the time the trust company made a deed to Mrs. Kaiser. Witness thinks that Starr paid the money himself, and, being asked again as to the purpose of the deed from Starr to the trust company, replied: "This deed was made to the Associated Banking & Trust Co. at our request by Mr. Starr, to secure me in the payment of the fee that I have spoken about." On cross-examination he further states that at one time they gave Honeyman, a real estate agent, an order to sell the property; that he was willing to have the deed made to Mrs. Kaiser, provided Starr would pay his fee; that the deed was made at Starr's request; that it was understood that, whenever desired, the property could be sold, or when Starr desired to sell it the money should be paid, and the witness was confident that the property was placed in the real estate agent's hands with Starr's consent.

Arthur P. Tift testified that he was the secretary of the trust company; that the deed in question was received by the company, in trust to secure a debt due to Judge Pipes, and in trust for William L. Starr; that it was not given as an absolute deed; that he executed the deed to Mrs. Kaiser upon a written order from Judge Pipes and Mr. Starr; that there were no conditions imposed upon the company, except as trustee, the property to be deeded upon the order of these parties, and that it was put into the hands of a real estate agent for sale at the request of both Starr and Pipes; that Starr, Pipes, the attorney for defendant, and witness were present when the deed was turned over, and that the money was paid at the same time; that Mrs. Kaiser was in the office once, but whether at this time he could not say.

Mrs. Kaiser was called as a witness for the plaintiff, and testified that she had received a deed from Starr to the Green-

ridge property in January or February, 1900; that she paid \$50 therefor; that she never owned any property in the state before; that she did not herself pay the money, but that Mr. Kaiser did for her; that he bought the home property for her from the trust company, and paid the money; that he told her that he was going to buy it, and that he had put most of his property in her name; that he did not give her the money, but paid for it himself; that she never had possession; that Starr was an intimate friend of hers, but she knew nothing about his affairs; that she was a witness in the suit by Mrs. Starr against her husband, but did not know about the decree. This is, in substance, the evidence of plaintiff. The defendant offered none, except to show that the plaintiff signed and acknowledged the deed of July 14, 1899, given to the trust company.

1. The plaintiff alleges fraud, and must establish it if she would prevail; the burden of proof being with her. It is maintained by her that the writing executed and delivered to the trust company was not in fact a deed, but intended by the parties concerned, and given and accepted, as a mortgage to secure the payment of a fee due Judge Pipes for legal services rendered the defendant Starr, and for no other purpose; that, at the date of the conveyance by the trust company to Mrs. Kaiser, Starr paid the amount due Pipes, which discharged and extinguished the mortgage, but that instead of having the same canceled and surrendered, as he should, in good conscience, have done, Starr conspired with Mrs. Kaiser to cheat, wrong, and defraud the plaintiff, and procured her to take the deed from the trust company to said property, he at the same time directing the company to execute it; that said deed was voluntary and without consideration, and intended to cover up the property, and prevent plaintiff from enforcing her claim for support. This concerns the home property. As to the lot in Greenridge Addition, it is maintained that the deed thereto was also voluntary and without consideration, and given and accepted for a like purpose.

The defendant Kaiser, who alone prosecutes this appeal,

contends that the deed to the trust company was executed and delivered, and so intended, as a deed of trust, and that by the agreement of the parties concerned the company was fully authorized to sell the property and convey title, and that out of the proceeds the claim of Judge Pipes was to be discharged, and the surplus, if any, to be paid over to Starr; and hence that she acquired a good title under the deed from the trust company. The Greenridge property she claims to have purchased *bona fide*, for value. The defeasance, trust agreement, or whatever arrangement was made or entered into, was entirely by verbal understanding; and it is suggested that the trust relations, except to show that the deed was in fact a mortgage, could not be established. But the trust to convey title has been executed, if such a relation existed, and the objection is without potency. If it was sought to enforce an unexecuted trust, and it became essential to establish it, a writing declarative thereof would have been necessary, as it could not have been proven otherwise, but such is not the purpose of the defendant. So that the authority of the trust company to make the conveyance in question depends upon the verbal understanding of the parties, and is not affected by the statute of frauds.

No one attempts to state in detail all the terms and conditions of the verbal agreement entered into between Starr and the trust company. Judge Pipes states its purpose very concisely. He says that it was to secure the payment of his fees, and this he reiterates with emphasis; and Mr. Tiff is hardly less succinct and comprehensive in his asseverations to the same effect. He says the writing was not given as an absolute deed. There was an understanding that whenever it was desired, or Mr. Starr desired, to sell the property, it could be sold, and that it should be deeded upon the written order of Starr and Pipes; but how and in what manner the transfer of title should be made is not defined. This is about all the light we have touching the terms and conditions of any trust agreement that may have been made or entered into. The central idea attending the transaction was manifestly to secure the

payment of the debt or obligation, and not to convey title by deed absolute. Other conditions than these have not been established, so that it is fairly, if not necessarily, inferable that the alleged trust deed was intended by the parties concerned as a mortgage, and must be so regarded. What the parties did afterwards cannot shed any light upon their agreement, as it constitutes no part of it. The property was placed in the hands of real estate agents for sale, but it was with the consent of Starr; and the deed to Mrs. Kaiser was made at his direction, so that nothing was done, apparently, without his concurrence. Once a mortgage always a mortgage; and the parties cannot divest it of its character, and treat it as a deed, so as to convey title, by any subsequent verbal understanding or agreement: *Marshall v. Williams*, 21 Or. 268 (28 Pac. 137). So that the acts of Starr and the trust company in deeding to Mrs. Kaiser, and treating the deed from Starr and the plaintiff to the company as a deed absolute, or as a transfer of title, did not make it so, or impart to it such potency. Although the deed to the trust company was given to a third party, it must be treated as a mortgage, nevertheless, and governed by the rules applicable to mortgages (*Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Martin v. Alter*, 42 Ohio St. 94), and therefore *Ladd v. Johnson*, 32 Or. 195 (49 Pac. 756), is without application.

The manner in which Starr procured plaintiff to sign the deed to the trust company is not above criticism. He undoubtedly conceived the idea at that time of deserting his wife, and was anxious to procure her signature. His purpose relative to the property probably did not then extend beyond the use of it as security for his obligation to Pipes, else he would have disposed of it otherwise, so that the device of having the trust company deed it to Mrs. Kaiser, and thus divest himself and wife of the legal title, must have been an afterthought. Having deserted plaintiff, he had reason to anticipate that she would make some demand upon him, either for separate support, or for alimony in a divorce proceeding. It is under these conditions that he dealt with Mrs. Kaiser. Now, so

far as disclosed by the evidence, Mrs. Kaiser was not present during the transactions relative to the execution of the deed by the trust company to her, except on one occasion, and it does not appear that she took any interest in the negotiations whatever. The money due Judge Pipes was paid over to him by Starr himself, and the deed was delivered in consequence thereof. Mrs. Kaiser states that her husband paid the money for her, and she relies upon the trust company's power and authority to make her a good title; but, as we have seen, it did not possess any such power or authority. She does not state to whom her husband paid the money,—presumably to Starr,—so that she was dealing with Starr, and willing to take whatever title he could procure for her by deed from the trust company. She could take no higher title than the trust company had, unless she was an innocent purchaser; but she does not make this defense, and cannot now avail herself of it. She and her husband were intimate friends of the Starrs, and manifestly knew all their troubles. Mrs. Kaiser admits as much. So we take it that she took the deed from the trust company, chargeable with as full knowledge as Starr himself had, and she stands in no better light. It is suggested that the deed to Mrs. Kaiser should, at any rate, be allowed to stand as security in superior rank to plaintiff's demand for the amount she was required to pay to discharge the obligation to Judge Pipes. The deed, however, which she holds, is of no consequence to convey title. But this aside, it does not appear how much she paid, or her husband for her, to Starr, if anything, for the property. She had an opportunity to state it, but did not, and it is very doubtful whether she or her husband paid anything. If they did, it could have been shown by her husband and Starr, neither of whom appeared as witnesses. True, if she saw fit, she had the right to rely upon the weakness of the plaintiff's case, and rest her defense there. But it is apparent from what has preceded that plaintiff has made a *prima facie* case entitling her to relief, sufficient to call upon the defendant to explain and show the good faith of the transaction.

and this she has not done. Plaintiff is therefore entitled to the relief she asks.

2. As it respects the Greenridge lot, we do not understand that Mrs. Kaiser seriously contests the plaintiff's right to the relief demanded. She took this deed while suit was pending for the separate allowance, with evident knowledge that the matter was pending, and accepted the same without the signature of plaintiff. She could not claim as an innocent purchaser under these conditions. The circumstances are so full of suggestion that she was in collusion with Starr for the purpose of hindering and impeding the plaintiff in enforcing her demand for separate allowance, and that she paid nothing for the deed, that it would be inequitable and unjust to allow it to stand. The decree of the court below will therefore be affirmed.

AFFIRMED.

Argued 16 July; decided 11 August, 1902.

NORMILE v. OREGON NAVIGATION CO.

[69 Pac. 928.]

41	177
42	611

TRIAL—VARIANCE.

1. There is a fatal variance between a claim against a common carrier on its common-law liability and proof of a contract of carriage limiting the liability for loss.

TRIAL—ALLEGATIONS AND PROOFS.

2. Proofs must follow and support the allegations of the pleadings—a plaintiff will not be permitted to sue defendant for a violation of its duty as a common carrier, and recover for some neglect of its duty as a warehouseman, for example.

CARRIERS—MULES—RED PLOWS—QUESTION FOR JURY.

3. It is the duty of a common carrier usually to unload goods at their destination with due care, and put them in a reasonably safe place, and whether this has been done in a given case is a question of fact: for example, whether a carrier has discharged its duty to the shipper when it has unloaded a mule onto a wharf, and tied it to a small, light plow, painted a vermillion red, is a question that should be submitted to the jury.

CARRIERS—ASSUMING LABOR OF UNLOADING—NEGLIGENCE.

4. Notwithstanding a stipulation that the shipper shall unload his property at destination, if the carrier voluntarily does so without notice to the shipper it is liable for negligence therein.

EXEMPTION OF CARRIER FROM LIABILITY FOR NEGLIGENCE.

5. A common carrier cannot at all limit its liability for loss of or injury to property entrusted to it for carriage caused by its own negligence or that of its servants or agents.

CARRIERS—VALIDITY OF CONTRACT AS TO VALUE OF LIVE STOCK.

6. A contract of shipment of live stock, providing that the stipulated tariff is less than that for transportation at carrier's risk, and is given in part consideration of shipper's agreement to limitation of carrier's liability, and it is agreed the value of the stock does not exceed \$100 per head, does not make a partial exemption from liability for negligence, but a valid valuation; it not being shown that it was not entered into freely by the shipper, or whether he could have obtained other terms on a higher valuation.

From Clatsop: THOMAS A. MCBRIDE, Judge.

This is an action by S. Normile against the Oregon Railroad & Navigation Co., to recover the value of a mule, which, with other stock, the defendant, it is alleged, undertook and agreed, for the consideration of \$15, to transport from Portland to Astoria, skillfully and safely, and there deliver to plaintiff in good condition. It is further alleged that the defendant is a common carrier, and engaged in that business, and that it placed the stock, consisting of eight head of horses and two head of mules, on board its steamer Hassalo, to transport the same to Astoria, but did not transport it safely or in good condition, and did not use due or ordinary care in the handling and delivery thereof, but upon the arrival of said steamboat at the port of Astoria, and while the animals were still in its possession, defendant wrongfully, carelessly, and negligently tied one of the mules to a small, light plow, painted red, by reason whereof said animal, although gentle and tractable, by moving its head also moved the plow, which was wholly detached, and, becoming frightened, ran away and was injured.

Two defenses were interposed. By the first it is alleged that the parties entered into a written contract concerning the shipment and transportation of the stock; that the defendant received, and, with due care and diligence, safely transported and delivered, the same, and the whole thereof, to plaintiff at Astoria, in like condition as when received, in accordance with the terms of said shipment and the conditions of said contract;

that immediately upon the arrival of said stock at the port of Astoria, the plaintiff took into his possession, receipted to the defendant therefor, and paid the defendant the agreed compensation of \$15 for its carriage and delivery. The second defense is partial only, wherein it is alleged that, by the terms of the written contract, it was agreed and provided that the value of the stock did not exceed \$100 for each head, and that the recovery, if any be had, should not exceed that sum.

The reply alleges that the defendant is a common carrier, as set up in the answer, and is required and enjoined by law to carry all freight and live stock that may be delivered to it safely and securely, and deliver the same, in as good condition as when received, to its owner at the termination of the shipment; that the alleged and pretended contract set forth by defendant is fraudulent and void, for the reason that at the date of its execution the regular price charged by said company for transporting horses and mules from Portland to Astoria was \$1.50 per head, which price was charged to the plaintiff, but that by the terms of the said alleged agreement it is attempted to limit the value of said stock and defendant's liability therefor, contrary to law and public policy; and for the further reason that P. Schrader signed the said agreement without having an opportunity to read it, and was compelled thereto before defendant would receive and transport said stock. It is further alleged that defendant refused to permit the plaintiff to load, or assist in loading or unloading, said animals on or off the boat, but that defendant, without authority from plaintiff, wrongfully and unlawfully, and in violation of the terms of said contract, of its own volition, loaded the horses and mules on said boat, and unloaded them off the same, and tied them on the wharf and in the warehouse of the defendant at Astoria, and while in the possession of defendant, and in the unloading, the injury to said mule occurred, all without any fault of plaintiff, but by reason of the carelessness and negligence of the defendant.

There was evidence tending to show that Schrader, who was acting for plaintiff, delivered the animals to the defendant at

Portland for shipment to Astoria; that the deck hands put them aboard the boat; that when he arrived at Astoria he went ashore, after the boat had been there a little while; that the horses were then unloaded, and tied on the dock; that he did not know when they were taken off the boat, as he was asleep at the time, and was not notified; that no one else had charge of the stock but him; that he started to take the horses, but was notified that the freight would have to be paid before he could proceed; that he went at once to plaintiff's house near by, who was then not out of bed; that in the course of a half an hour plaintiff appeared, paid the freight, and receipted for the stock, and that as soon as this was done Schrader attempted to take four of the horses away, whereupon the mule, seeing the horses start, made an effort to follow them, and in doing so shifted the plow, which frightened it, and the injury ensued; and that Schrader paid his own fare to Astoria. The bill of lading signed by Schrader was offered on the part of the defense, and admitted in evidence. Upon the cause being submitted, plaintiff obtained a judgment for \$150, and the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Cotton, Teal & Minor*, and *William C. Bristol*, with an oral argument by *Mr. Bristol*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Charles W. Fulton*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. At the threshold of the controversy, counsel for defendant insists that, as plaintiff did not declare upon the special contract entered into by the parties respecting the shipment, as evidenced by the bill of lading, he should have been denied relief because of a variance in the proof. The plaintiff has a legal right to pursue the form of action adopted (3 Ency. Pl. & Pr. 818), but, having thus made his election, he must recover upon the common-law liability, or not at all, and a valid

special contract of the parties, providing or stipulating for a different or restricted liability in the particular or particulars relied upon for recovery, will not, in reason and good practice, support the action. It is seldom that bills of lading showing the contractual and correlative relations and obligations of the carrier and shipper relative to the shipment are drafted with a view to changing or restricting all the common-law liabilities to which the carrier is subjected; and if any remain upon which an action may be founded and recovery had without coming in conflict with special limitations and restrictions, there exists no reason why the common-law action may not be maintained, notwithstanding the special contract. To illustrate: If there be a special restriction on account of loss occasioned by fire or by robbery, that, of itself, could not prevent a recovery upon the common-law liability in a failure to carry safely in other respects. Ordinarily, the common carrier is considered and treated as an insurer of the goods it undertakes to carry, and all limitations of common-law liabilities are in the nature of exceptions to its general undertaking; and hence, in order to avoid such liabilities, the exceptions must be pleaded. Thus, it has been held in *Missouri Pac. Ry. Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App. § 168, that "in an action against a common carrier, founded on the common-law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured. If there was a special contract, restricting the common-law liability of the carrier, it devolved upon the carrier to allege and prove it." To the same purpose is *Coupland v. Housatonic R. Co.* 61 Conn. 531 (23 Atl. 870, 15 L. R. A. 534), a case of much analogy to the present. See, also, *Tuggle, v. St. Louis, K. C. & N. Ry. Co.* 62 Mo. 425, and the reasoning of Mr. Justice GRAVES in *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329 (12 Am. Rep. 275). And this is just what the defendant has done in the case at bar. It has set up that, by a special agreement, the plaintiff limited himself in his recovery to \$100. The plaintiff replied that the alleged agreement was void, as being contrary to sound public

policy. If void, the defendant's common-law liability remains unchanged and unrestricted in that particular, and the special contract cannot stand in the way of plaintiff's recovery by the common-law form of action. If, however, the special agreement is found legal and binding, there is a variance fatal to that form of action, and the plaintiff must be remitted to the special contract and an action thereon: *Indianapolis & Cin. R. Co. v. Remmey*, 13 Ind. 518; *Indianapolis & Cin. R. Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.* 90 Ind. 459; *Snow v. Indiana, B. & W. Ry. Co.* 109 Ind. 422 (9 N. W. 702); *White v. Great Western Ry. Co.* 2 C. B. (N. S.) 7.

2. It is suggested by counsel for plaintiff that, after having alleged negligence on the part of the defendant in securing the mule in the manner described, it could make no difference whether it was acting in the capacity of a common carrier or a warehouseman; it would be liable in either capacity. But the action is essentially grounded upon the failure of the company, through its negligence, to transport and deliver safely, and not upon any negligence in properly storing the property to await its reception by the shipper. The complaint proceeds upon that idea, and the reply is in reaffirmation of it. So that recovery must be had, if at all, against the defendant in its capacity as a common carrier, and not a warehouseman.

3. This brings us to the contention of the defendant that it was relieved of liability under the complaint when the transfer of the stock was made from the boat to the wharf. There is an irreconcilable conflict in the authorities as to when the duties of a common carrier cease and those of a warehouseman begin, where freight is carried to its destination, and unloaded, and put in a place usual and convenient for its reception by the shipper. Many of the authorities hold that the shipper must have a reasonable time after the arrival and deposit thereof in which to receive and take it away; some requiring notice to the shipper also, while others relieve the carrier at once upon the safe deposit and storage at the usual place, the same being convenient for its reception by the shipper. It is not essential that we should declare at this time which of the rules is the

better, or which should be adopted, as under either it is necessary that the goods should be unloaded with care, if they are to be taken from the car or boat to a place of deposit, and put in a place reasonably safe and free from liability to injury. The carrier does not, in any event, discharge itself of duty as a carrier by merely taking goods to the terminus of its route, but, as is said by Mr. Chief Justice BIGELOW in *Rice v. Boston & W. R. Corp.* 98 Mass. 212, "it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done, the duty and responsibility which attach to a corporation as carriers do not close." See, also, *Thomas v. Boston & Prov. R. Corp.* 10 Mete. (Mass.) 472 (43 Am. Dec. 444); *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 262 (61 Am. Dec. 423); *Gregg v. Illinois Cent. R. Co.* 147 Ill. 550 (35 N. E. 343, 37 Am. St. Rep. 238). The carrier is required to safely carry and deliver, and, without determining which is the better rule, there is evidence sufficient to go to the jury in the case at bar whether in any event the carrier safely deposited and secured the stock upon its wharf or in its warehouse, whatever the place of deposit may be termed; that is to say, whether they were taken from the boat, and put in a place reasonably secure and free from all liability to injury, which includes, of course, the securing of the animals in a reasonable manner with reference to their safety. The company could not be said to have discharged its duty as a carrier if at the place of destination it had left the horses and mules loose, to go where they pleased, and thus permitted them to run astray or be injured, nor did it discharge its duty in that capacity until it had reasonably secured the stock after unloading it from the boat; and it was a proper question for the jury to determine whether defendant exercised reasonable care in securing the mule in controversy to a light plow, painted red, for in doing this act it was discharging a duty incumbent upon it as a common carrier. The instructions given were in harmony with this view, and hence were not subject to exceptions.

4. In this connection another question may be noticed. By the terms of the bill of lading, it is agreed that the shipper should load and unload the stock, and it is contended by the defendant that it was the duty of the plaintiff to unload this stock from the boat, and the defendant was thereby relieved of all responsibility in respect thereof. The plaintiff answers this contention by saying that the defendant, regardless of the terms of the contract, unloaded the stock of its own accord, without giving plaintiff an opportunity to attend to the matter. There was evidence adduced tending to show that the employes of the defendant unloaded the stock in the morning before Schrader, who accompanied it, was up, and without calling him, or notifying him that it was ready to be taken from the boat. The court instructed the jury, if, notwithstanding the stipulation in the bill of lading by which the shipper was to unload the stock, the defendant undertook to discharge that duty itself, without notice to the shipper or his agent, it was liable if negligent in the performance of the act. This was a correct exposition of the law, and the instruction was proper: *Missouri Pac. R. Co. v. Kingsbury* (Tex. Civ. App.), 25 S. W. 322; *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608 (85 N. W. 832, 55 L. R. A. 289).

5. It is a sound and wholesome doctrine, based upon considerations of public policy and fair dealing, that a common carrier will not be permitted to stipulate against liability for loss or injury of property intrusted to it for carriage and transportation occasioned by its own negligence or that of its agents and servants. In some jurisdictions such a stipulation or agreement is upheld as valid, but the very great weight of American authority is in support of the doctrine as stated: 5 Am. & Eng. Ency. Law (2 ed.), 308. The text of this valuable edition is so strongly and abundantly supported by apt citations that it is unnecessary for us to make further references to the authorities. Nor can the carrier be permitted to stipulate or contract for a partial or limited exemption from liability occasioned by its negligence with any more reason than it may for a total exemption. We adopt the reasoning of

Mr. Justice CALDWELL in *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 327 (14 S. W. 311). It is palpable and cogent, and leads with irresistible power to but one result. "To our minds it is perfectly clear that the two kinds of stipulations—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so; the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of the property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one half, three fourths, seven eighths, nine tenths, or ninety-nine hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter it may hereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither." Like reasoning is employed by Mr. Justice DICKENSON in *Moulton v. St. Paul, M. & M. Ry. Co.* 31 Minn. 85, 88 (16 N. W. 497, 47 Am. Rep. 781), and the authorities are ample by which, to our minds, the doctrine is satisfactorily settled and established: *Railroad Co. v. Lockwood*, 84 U. S. (17 Wall.) 357; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645 (2 Pac. 821, 46 Am. Rep. 104); *Black v. Goodrich Transp. Co.* 55 Wis. 319 (13 N. W. 244, 42 Am. Rep. 713); *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 485 (58 N. W. 780, 41 Am. St. Rep. 55); *Alair v. Northern Pac. R. Co.* 53 Minn. 160 (54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588). No sort of consideration, whether it be based upon a different or lower tariff, or whatever it might be, will therefore exempt the carrier, in whole or in part, from liability attributable to his own negligence; and, where such is the essential purpose of the contract, it cannot be upheld.

It must be conceded that authorities are to be found to the contrary, but many that are cited to that purpose do not so hold, and confusion has arisen through their misinterpretation, which has, no doubt, in some instances, at least, influenced such contrary holding. It is true that a common carrier's common-law liability may be limited and restricted in almost, if not in every, other particular. In this there is almost entire harmony among the authorities, and the confusion alluded to is the outgrowth of general expressions touching the limitations of liability as to the carrier, when it was not intended to convey the idea of an exemption from a liability, in whole or in part, for the loss sustained. Thus, in *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284 (10 N. E. 836), the court uses the expression, "taking the whole agreement together, the liability of the defendant is limited by the valuation expressed in the shipping agreement;" but this case is in no sense an authority for a partial exemption. "It was substantially covered," as the court say, by *Graves v. Lake Shore & M. R. Co.* 137 Mass. 33 (50 Am. Rep. 282). As to the latter case, there can be no misunderstanding, as Mr. Chief Justice MORTON, in announcing the opinion, directly observed that "if we adopt the general rule that a carrier cannot thus exempt himself from responsibility, we are of the opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability from the negligence of its servants. It has made no contract for the purpose." So, in the case of *Hart v. Pennsylvania R. Co.* 112 U. S. 331 (5 Sup. Ct. 151), sometimes cited as sanctioning a partial exemption, the court say: "The limitations as to value has no tendency to exempt from liability for negligence." In further illustration, see *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538. So that there is not so much inharmony among judicial utterances upon the subject as might be suggested by a cursory reading or consideration thereof. See Hutchinson, Carr. (2 ed.) 250.

6. The agreement so far as it is material here, is as follows: "That the said company has this day received from the ship-

per (P. Schrader) 8 head of horses, 2 head of mules, to be transported * * at the rate of * * trf. * * per head, which is less than the tariff rate for the transportation of live stock at carrier's risk, and is given said shipper in part consideration of his agreement to the limitation of the liability said company as common carrier, as herein set forth, upon the terms and conditions following, which are accepted and agreed to by the shipper as just and reasonable. * * And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sum, to wit: Each horse, one hundred dollars; each mule, one hundred dollars; * * such valuation being that whereon the rate of compensation to this company for its services and risk connected with said property is based." We are concerned with its proper construction, as a correct solution of the controversy depends upon it. It will be noted that the contract was entered into by Schrader as shipper, and not by the plaintiff in person. But, however this may be, Schrader was the acknowledged agent of the plaintiff, and was, therefore, duly authorized to enter into such contract on his part: *Squire v. New York Cent. R. Co.* 98 Mass. 239 (93 Am. Dec. 162); *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284 (10 N. E. 836).

If the purpose of the contract was merely to place a limit on the amount for which the defendant shall be liable,—that is to say, exempt it in any measure from full liability, as respects the value of the property concerned,—then clearly, as to any losses resulting from negligence, it cannot be helped; and this upon the ground that it would not be just and reasonable. *Quasi* public functionaries are especially held to fair dealing, and when acting as public carriers, with the advantages between them and the shipper standing very much to their side, they cannot be allowed to enter into any contract relative to the business in which they are engaged unless it is just and reasonable; and a contract exempting from liability based upon negligence cannot be so characterized. If, however, upon the other hand, the stipulation as to the

value is fairly and honestly made as a basis of the carrier's charges and responsibility, it will be sanctioned as a proper and lawful contract. It is confidently asserted by high authority that there can be no difference in a case like the present one, where the stipulation is that the value does not exceed a specified sum, and one where the value is stipulated to be a given sum; and further, that it can make no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract, on which the minds of the parties meet, and on which they act. Presumably, charges for transportation are measurably based upon the value of the property, and, furthermore, the measure of care on the part of the carrier will very naturally be bestowed in proportion to the value of the goods in transit. All recognize the impracticability of fixing one rate applicable to stock of different value, and it seems reasonable that for stock of ordinary worth an ordinary or average value may be fixed, and a rate for shipment arrived at accordingly, and an agreement fairly entered into upon this idea between carrier and shipper would appear to meet all the requirements of the law. So, in the case at bar, if the plaintiff freely, and without restraint,—that is, was laboring under no such inequality of conditions as that he was compelled to enter into the contract whether he would or not, in order to have his stock carried—executed the contract in question, he is bound by the stipulations as to value. It is, in effect, a representation that the horses and mules were not worth to exceed \$100 per head, and an express assent to the rate fixed as a proper charge for transportation based upon such valuation. The plaintiff cannot consistently claim a higher valuation upon the agreed rate of freight, and the contract is not, in any proper sense, one for the exemption of defendant from the consequences of negligence. In such a case the shipper is estopped to deny the value which he himself has deliberately fixed and agreed to as the real value of the prop-

erty when it comes to a loss. Such stipulations and contracts are supported and upheld upon considerations of fairness, as it relates both to the shipper and the carrier. We are led to this conclusion by cases of palpable analogy and high authority. Indeed, there are but few opposed: *Hart v. Pennsylvania R. Co.* 112 U. S. 331 (5 Sup. Ct. 151); *Alair v. Northern Pac. R. Co.* 53 Minn. 160 (54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588); *Railway Co. v. Sowell*, 90 Tenn. 17 (15 S. W. 837); *Starnes v. Railroad Co.* 91 Tenn. 516 (19 S. W. 675); *Richmond & D. R. Co. v. Payne*, 86 Va. 481 (10 S. E. 749, 6 L. R. A. 849); *Gregg v. Illinois Cent. R. Co.* (147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343); *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284 (10 N. E. 836). See, also, *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 485 (41 Am. St. Rep. 55, 58 N. W. 780).

The testimony shows that the plaintiff had been shipping on the steamboat line between Portland and Astoria for six years; that shortly prior to the shipment in question he endeavored, without success, to get a lower freight rate from the company; but nothing appears to have been said touching the valuation of the stock to be transported. Schrader says he did not know anything about the price of shipment or the rate at the time he took the stock to the Portland dock; that he desired it shipped at whatever the rate was; that after he took it to the dock, he saw a young man with reference to the shipment, who produced the shipping receipt, saying, "You will have to sign this," and he signed it. There was no testimony of a different tendency, and this, in brief, shows the considerations and circumstances under which the contract was entered into. There was no effort at the immediate time to obtain a different rate, nor was there any effort whatever to secure a different agreement as to values. Plaintiff knew the rate, because he had previously endeavored to obtain a lower rate, and presumably he was acquainted with the terms of shipment as to values, having been for six years a shipper by the river, and, being cognizant of these matters, directed his stock to be shipped without any endeavor or attempt to arrive at a different agree-

ment, except as to the rate; and we can see nothing in the immediate circumstances attending the shipment and execution of the bill of lading that savors of restraint or unfairness on the part of the defendant in requiring its execution on the part of Schrader. It is not disclosed whether or not plaintiff could have obtained other terms, based upon higher valuation of the stock, had he applied therefor, and represented that it was above the average value stated in the bill of lading, and we must presume that he could have obtained other conditions altogether reasonable; the defendant being a common carrier of live stock, as well as other property, and being in duty bound to accept and carry all stock offered on terms that are reasonable and just. From these considerations, it was error for the trial court to leave the question with the jury, as it did, whether there was any consideration in the way of a lower or less than the ordinary rate for a limitation of the defendant's liability for negligence as to such stock. The contract is one which the parties, so far as the record shows, could lawfully make, and there was no evidence tending to show that it was not freely and fairly executed by the parties involved. The plaintiff was, therefore, not entitled to recover upon his common-law action, having entered into a special contract relative to the utmost value of the animal injured, so that the judgment must be reversed, and the case remanded. REVERSED.

Decided 28 April, 1902.

GOODALE v. WHEELER.

[68 Pac. 753.]

FRAUDULENT CONVEYANCE—SUFFICIENCY OF EVIDENCE.

1. Defendant, while heavily indebted, organized a corporation, the stockholders of which were his wife and sons and two others, who were nominal stockholders only, to which he transferred his property at an excessive valuation, receiving therefor stock and notes of the corporation. The directors of the concern were authorized to issue bonds for the debts of the corporation, and defendant took all the bonds, and applied them as payments on the notes. As president of the corporation he managed all its affairs, and only two meetings of the directors were held. Defendant charged against the company certain sums in favor of his sons for alleged services rendered prior to the organization, and subsequently conveyed property of the corporation to them,

charging them therefor on their account with the corporation. The sons conveyed the same to defendant's wife without consideration. *Held*, that the conveyances were void, as in fraud of creditors.

CREDITOR'S BILL—NOTICE—INNOCENT PURCHASERS.

2. The sons, having knowledge of the purpose of the organization and attending circumstances, could not claim as innocent purchasers, though the consideration may have been valuable.

CONVEYANCE TO RELATIVES—BURDEN OF PROOF—CREDIT.

3. Where property is conveyed to a relative under suspicious circumstances, the burden of proof is on the latter to show the good faith of the transaction.

From Lane: JAMES W. HAMILTON, Judge.

Creditor's bill by J. C. Goodale against A. Wheeler and others to set aside alleged fraudulent conveyances. From a decree for plaintiff, defendants appeal. **AFFIRMED.**

For appellants there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. Geo. E. Chamberlain*.

For respondent there was a brief and an oral argument by *Mr. John M. Williams* and *Mr. L. Bilyeu*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. This is a creditors' suit instituted June 12, 1899, to have A. Wheeler declared to be the owner of lots 1 and 2, block 6, in Fairmount, Lane County, Oregon, to set aside certain conveyances of said lots and subject them to the payment of plaintiff's demand. On October 22, 1892, plaintiff and others became sureties for Wheeler upon a promissory note, which remaining unpaid, a judgment was, on June 12, 1896, obtained against all the makers. Plaintiff subsequently paid the judgment, amounting to \$1,874.35, and on May 13, 1899, filed his notice of such payment and claim for contribution against the co-sureties for their *pro rata* share thereof, and against Wheeler for the whole amount. Subsequently execution was issued and returned *nulla bona*. That Wheeler is indebted to the plaintiff in this amount with accumulated interest is satisfactorily established. The defendant, Mary B. Wheeler,

is the wife of A. Wheeler, and O. A. Wheeler, T. C. Wheeler, and A. C. Wheeler are his sons and the stepsons of Mary B. Wheeler. The defendant the Lane Lumber League was incorporated and organized about July 28, 1892, with a capital stock of \$50,000, divided into 500 shares of \$100 each. A Wheeler subscribed for 250 shares, O. A. Wheeler for 18, T. C. Wheeler for 9, and W. N. Cheesman and B. A. Washburne for 1 each. Cheesman and Washburne paid nothing on their stock, and were conceded to be only nominal stockholders. On the day of the organization of the company by the election of directors, A. Wheeler and T. C. Wheeler made a proposition, which was accepted, to sell to the company certain property at values placed opposite the description thereof, namely: A sawmill, planing mill, water rights under lease for 99 years, stable, sheds, yards, etc., \$21,000; timber land, section 16, township 18 south, range 1 east, \$3,500; lumber to be invoiced, \$3,500; merchandise, safe, teams, wagons, camp equipments, etc., \$1,700; logs, 2,224,254 feet at $4\frac{1}{2}$, \$10,009.14; interest in lumber and accounts of the U. W. L. M. Association, at Eugene, \$3,200; lumber on the yard at Albany, \$2,000; total, \$44,909.14, payable in capital stock of the company for \$27,700, and its notes for the balance. On August 29, 1892, A. Wheeler and Mary B., his wife, by deed then delivered, of date July 29, 1892, and by other transfers, conveyed to the company all the real property noted in the above schedule, except one half of the school section, which purports to have been transferred by O. A. Wheeler, whereupon the company executed and delivered to A. Wheeler eleven notes, aggregating \$16,683.44, due and payable at dates ranging from September 5, 1892, to July 5, 1893. There was due the state, upon the school section transferred, the sum of \$400, which the company assumed, but to reimburse it therefor Wheeler agreed to indorse the amount upon the last of its notes to fall due. The stock books were made to show that 279 share of the capital stock of the company were fully paid up, and it was ordered that the stock be issued. On November 25, 1892, the directors of the company were authorized to issue \$10,000 in bonds, and

to execute a mortgage on the real property of the concern to secure the payment of the same, the proceeds to be applied towards the payment of its existing indebtedness. These matters are shown by the minutes of the directors' meetings. On October 7, 1895, at a directors' meeting called for the purpose, the company was authorized to convey to H. C. Humphrey certain real property valued at \$1,200, to be sold by him and the proceeds applied in satisfaction of certain interest due on its bonds. This was the last meeting attempted to be held by the board of directors, and none were held between November 25, 1892, and that time. Nor does there appear to have been any meeting of the stockholders, except the first, held on June 28, 1892. H. C. Hunter conveyed to O. A. Wheeler, trustee, the property in question, June 5, 1894. On May 15, 1895, he conveyed to T. C. and A. C. Wheeler, and on the same day they conveyed to Mary B. It is alleged, in effect, that at the time of the organization of the Lane Lumber League the defendant A. Wheeler was insolvent; that the company was organized by and at his instigation, as a scheme to enable him to cover up his property and defraud his creditors, and to that end he transferred to it all of his property; that O. A. Wheeler took and received said deed nominally as a trustee for the company, but in reality for A. Wheeler, who was the real beneficiary; that O. A. conveyed to T. C. and A. C., and they to the wife, Mary B., without consideration, and that such conveyances were fraudulent as to the plaintiff, and a hindrance to the enforcement of his judgment against the defendant A. Wheeler. It is admitted that Mary B., gave nothing for the property, and the father and sons all say that it was a gift to her by the sons. Wheeler asserts that he was not insolvent at the time, and denies any purpose of defrauding his creditors, through the instrumentality of the corporation or otherwise. His indebtedness, he states, was about \$25,000, and that his assets consisted of the property turned into the company and some \$11,100 in stocks, notes, and accounts, which he retained in his own right, or to put in another way, he asserts that his

assets, after the organization and transfer to the company, consisted of \$25,000 in stock of the company, its notes for \$16,683.44, and stocks, notes, and accounts retained, \$11,100; total \$52,783.44.

The evidence discloses that the mill property, including the planing mill, water rights, etc., denoted by the first item in the schedule, valued at \$21,000, was incumbered at the time by a mortgage to the school fund for \$5,000, which Wheeler was to pay. He subsequently reduced it to \$2,000, but, being unable to pay the balance, it was foreclosed, and the property was bought in by the state for \$800. The timber land, turned in at a valuation of \$3,500, was incumbered, as we have seen, with a debt of \$400. This was subsequently sold for \$900, and the state paid out of the proceeds. The logs were incumbered with \$2,000, which Wheeler agreed to pay, and which he says he subsequently paid. The item of interest in lumber and accounts of U. W. L. M. Association, it subsequently transpired, amounted to an estimated valuation of \$1,200, instead of \$3,200, and it is not apparent what was finally realized from it; so that we find a shrinkage in four of the principal items of property transferred to the company of \$27,000; nor is it clearly shown what was realized from the other items. Of the \$11,100 in stock, notes, and accounts, he has realized, according to his own statement, stock in the McKenzie Lumber Co., (not in money) \$600, stock in Eugene Lumber Co., \$979; on notes and accounts in Albany probably \$3,000. Besides this, he had notes and accounts at Springfield, estimated at from \$1,500 to \$2,500, but what was realized thereon is not apparent. If they be valued at \$2,000, probably an excessive estimation, his individual assets would be reduced to \$6,579, showing that his entire assets were less than his indebtedness, and probably much less than the estimates here made. We have not the means of ascertaining what amount was realized from some of the items, as there is no testimony in the record to show it. But it is quite probable that Wheeler was insolvent at the time of the incorporation of the company.

The business was carried on actively and steadily for one year, and, at intervals, for another. The logs transferred were sawed into lumber, but none others, although perhaps 1,000,000 feet were put into the pond. Wheeler was the president of the company, and by virtue of his office general manager. He states, however, that he and the boys were the agents of the concern, and transacted and managed all its business. Of the bonds that were issued he took the entire lot, and canceled the company's indebtedness on the notes given to him therefor. These bonds he transferred to the creditors in payment of his indebtedness to them, but not one of them has been paid, although there is evidence of payment of a portion of the interest. He was indebted to his son O. A., according to his testimony, for services rendered him prior to the incorporation of the company, in the sum of \$1,026.34. This, with \$120 interest thereon, he paid by canceling that amount of the company's indebtedness by note to him and giving his son credit on the books. So with T. C. He charged the company with \$607 accrued for services rendered prior to the organization, together with \$100 interest, and credited the son. The above items standing to the credit of O. A., with others, amounted on May 15, 1894, to \$1,550.59, against which there appears a debt of \$608.88, leaving a balance of \$941.71 due him. As to T. C., the above items, with others, amounted on that date, to \$1,093.11. On this date O. A. made the conveyance to T. C. and A. C. for the alleged consideration of \$500, in payment whereof Wheeler, on the next day, charged each of the three sons \$166.66 in their respective accounts with the company. On the same day A. C. Wheeler was credited on his account with \$302.84. Wheeler, explaining this credit, says the remnant or last of the lumber belonging to the company was sold to Wheeler Bros., a copartnership composed of the three sons, and this amount was turned over to A. C. out of the proceeds by Wheeler, to be by him turned over to Wheeler's family at intervals for their use while he was to be away from home. The company, he says, owed him a balance of salary, and this was transferred from his account; that is, charged on

the books of the company and credited to the account of A. C. The accounts of the other two sons were charged, one with \$370.62, and the other \$446.44, on account of this sale.

It is a matter of grave doubt whether O. A. and T. C. ever paid anything on their stock. The evidence shows, in effect, that A. Wheeler was the owner, or at least the holder, of the certificate from the state to the section of school land turned into the company, and whatever title it acquired thereto was by assignment from him. Indeed Wheeler says his sons had no interest in the property prior to the organization of the company, and yet one half of the section is devoted at a fancy figure to the payment of the major portion of O. A.'s 18 shares, and one fourth to T. C.'s 9 shares, of the capital stock. So that it is but a reasonable and altogether natural deduction to conclude that A. Wheeler was the sole beneficiary of the operations of the concern. Its property was his property, and his debts, by a skillful circumlocution of bookkeeping, and a liberal use and transformation of negotiable paper, were made its debts *ad libitum*. The company had long ceased to be an operative concern, or even an entity, except in name, and Wheeler controlled it absolutely for his own benefit. It is under these conditions that lumber, nominally the company's, was exchanged with Hunter for the property in dispute, and deeded to O. A. as trustee for the company. This, it is related, was done as a matter of convenience. Eleven months later the sons purchased, and Wheeler, acting in behalf of the company, sold, the property to them, and the alleged payment is made in the manner as above indicated; Wheeler, in effect, charging his own account and crediting the same with the supposed consideration.

2. The transfer of the \$302.84 to the credit of A. C. in his account with the company, for the use of Wheeler's family, is indicative of the manner in which he utilized and treated the funds of the company,—simply as if they were his own. He may just as well have taken the money and given it direct to his family, and the charging of his own account with the amount was idle formality, as the account was, in effect, with

himself. The sons were fully cognizant of the true status of the organization; that their dealings with it were in reality with their father; and that when they purchased the property in question they purchased of their father. They knew, of course, that the device served as a cloak to shield the property against the diligence and scrutiny of creditors, and was well calculated to delude and mislead them, and that the property was kept sequestered and secluded, and its real identity as regards the ownership concealed, and continued so until it reached the hands of Mrs. Wheeler. So they were in reality parties to whatever purpose the father had in mind in thus concealing and finally procuring the property to be deeded to his wife. That it was his purpose eventually to elude the demand of plaintiff there is no longer any doubt, and that he caused the title of the property in question to pass through his sons, thence to his wife, for the accomplishment of that end, is a perfectly consistent and an altogether natural sequence of that purpose. With the knowledge of the purpose and the attending circumstances, the sons are chargeable with his intentions, and it matters not if they parted with value. They have thus become parties to the fraud, and cannot, therefore, claim as innocent purchasers.

3. To say the least, the transactions are attended all the way along with such an atmosphere of distrust, and, being among near relatives, the defendants were called upon to explain and to establish the exercise of entire good faith to overcome the *prima facie* case made by the proof favorable to the plaintiff's cause, and this they have not done. The principles here involved and stated find support in *Currie v. Bowman*, 25 Or. 364 (35 Pac. 848, 44 Am. & Eng. Corp. Cas. 662); *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Bennett v. Minott*, 28 Or. 339 (39 Pac. 997, 44 Pac. 288), and serve in their application to the facts to affirm the decree of the trial court, and it is so ordered.

AFFIRMED.

Argued March 10; decided 31 March, 1902.

JOHNSON v. TOMLINSON.

[68 Pac. 406.]

JURISDICTION OF EQUITY.

1. In a suit in form to quiet title, plaintiff, who was a riparian owner, alleged that there was between the meander line and the line of high water a strip of land not in possession of another, and to which, as riparian owner, he had title. The answer alleged that the meander line and the line of ordinary high water coincided, and defendant claimed the land between high and low-water marks. *Held*, that, the dispute not being one as to the location of a boundary, but as to whether there was any upland between the meander line and the line of high water, a contention that the controversy was as to the true location of a boundary line, and triable at law, was without merit.

RIPARIAN BOUNDARY ON MEANDERED STREAM.

2. Where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner: *French Live Stock Co. v. Springer*, 85 Or. 312, cited.

EVIDENCE AS TO COINCIDENCE OF MEANDER AND HIGH-WATER LINES,

3. On an issue whether the ordinary highwater line of a stream and the meander line as run on the ground coincided, *held*, that the evidence showed a body of land between the meander line and the line of ordinary high water.

From Tillamook: REUBEN P. BOISE, Judge.

This is a suit to quiet title to a strip of land, containing about three quarters of an acre, lying between the government meander line and the line of ordinary high water in Tillamook and Trask rivers, both of which are tidal streams. A part of lot 10, section 26, township 1 south, range 10 west, as surveyed by the United States, is a peninsula, bounded on the east by the Trask, and on the south and west by the Tillamook River. The plaintiff owns a part of the southern point of the peninsula thus formed, and contends that a small strip of upland between the original meander line and the two rivers belongs to him. In his complaint he alleges that he "claims to be the owner in fee" of that portion of the lot which lies between the meander line and the line of ordinary high water, particularly describing the same by metes and bounds; that it is not in the possession of another; that the defendant, without right, claims some interest or estate therein adverse to the plaintiff,—and prays for a decree adjudging such claim to be without

merit and quieting his title. The answer denies that defendant's claim to the land described in the complaint is without right, or that he has no estate or interest therein, or that any portion of lot 10 lies between the meander line and the line of ordinary high water; alleges that the meander line is the western and southern boundary of the lot, and is the line of actual high water in Tillamook and Trask rivers; that the lands lying between the meander and the low-water line are tide and shore lands, and as such were in January, 1883, conveyed by the state to one Squires, through whom defendant derails title; that the defendant is in actual possession and occupation of all of such lands, as owner in fee, and has been in adverse possession during all of the sixteen years last past,—and prays for a decree quieting his title, and adjudging that plaintiff has no interest or estate therein. A reply was filed, and upon the issues joined the suit was tried, resulting in a decree in favor of the plaintiff, from which the defendant appeals.

For appellant there was a brief over the name of *Handley & Handley*, with an oral argument by *Mr. Thos. H. Handley*.

For respondent there was a brief and an oral argument by *Mr. B. L. Eddy*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The defendant insists that the only controversy in the case is as to the true location of the boundary of lot 10, and defendant's adverse possession to the property in dispute, and that both of these questions are purely legal, and should be tried at law. But we do not so construe the pleadings. The suit, in form and substance, is one to quiet title. The plaintiff alleges, in effect, that there is a strip of upland, not in possession of another, between the meander line and the line of ordinary high water, and that he is the owner thereof. The answer denies plaintiff's ownership of such strip of land, and sets up a claim in fee to all the land up to the meander line as actually

established by the government survey. In other words, the plaintiff, by his pleadings, asserts title in the upland to the line of ordinary high water, notwithstanding the fact that the United States meander line does not coincide therewith, but is some distance back from the stream, while the defendant alleges that the meander line and the line of ordinary high water coincide, but in any event he has title by virtue of a conveyance from the state to all the land up to the actual meander line. The dispute, therefore, is not as to the location of the boundary, but as to whether there is any upland between the meander line and the line of ordinary high water, and, if so, as to whom it belongs.

2. Under the law, as settled in this state, where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner: *Minto v. Delaney*, 7 Or. 337; *Weiss v. Oregon I. & Steel Co.* 13 Or. 496 (11 Pac. 255); *French Live Stock Co. v. Springer*, 35 Or. 312 (58 Pac. 102). It is stipulated and agreed that plaintiff is the owner of a certain described portion of lot 10, and, as a consequence, it necessarily follows from the rule stated that his title is not confined to the meander line, but extends to the stream, and includes all of the upland, if any, between the meander line and the line of ordinary high water. It is only important, then, to ascertain whether there is any such upland, and this is a question of fact, to be determined from the testimony.

3. Mr. Austin, county surveyor, who in March, 1899, at the request of the plaintiff, surveyed or attempted to survey the tract of land in controversy, testifies that he is acquainted with the location of the meander line as actually run on the ground, and that between such line and ordinary high water there is a strip of land, not covered by ordinary tides, which produces grass and other vegetation such as usually grows on the land above high water in that vicinity. Mr. Stillwell, who testifies that he has known the land in controversy for twelve or fourteen years, and was one of the chain carriers who assisted Austin in making his survey, says that the line run by

Austin for ordinary high-water mark is some distance outside of the meander line, and the land between the two lines is covered with grass, similar to that grown on high lands; that it is not reached by the ordinary tide, although covered when freshets and extraordinary tides are combined. Mr. Davies, who operates a sawmill near the land in controversy, and has known it for four years, testifies to substantially the same state of facts. The witness Olds says that he had known the land for fifteen years, and lived on it for some time; that he does not remember of the tides ever being over a part of the land in controversy; that it was covered with vegetation, and he had it fenced and used it for pasture; that red top and red clover, and other grasses such as are grown only above high water, were raised on the land. This witness and James Wilson both testify that they were acquainted with Squires, the predecessor of the defendant, and that he (Squires) pointed out to them the line of his tide land, and, as so pointed out, it did not include any of the grass land or land in dispute. The plaintiff testifies that he built a salt house on the land in controversy about three years ago, and a small cabin about six years ago, and that it is only at new and full moon tides and during storms that the land is overflowed; that an ordinary tide does not come up onto the land, and that it is covered with velvet grass, red clover, and some wild grasses, and a mowing machine could be run over it. From this testimony, which is not substantially contradicted by the defendant, it is quite clear that there is a body of upland lying between the meander and actual line as run by the government and the line of ordinary high water, which, under the authorities cited, belongs to the plaintiff.

Both brief and argument have placed much stress upon the question of the accuracy of the description of the land as set out in the complaint and decree of the court below, but we do not regard that question as at all material at this time. As already suggested, this is not a suit to establish the boundary between plaintiff's upland and defendant's tide land, and the decree of the court below is so framed as to limit plaintiff's

title "to line of ordinary high water." The courses and distances, as given in the decree, are controlled at each step by this phrase, and therefore any error therein is immaterial. The decree settles the contention between the parties, as made by the pleadings, by determining (and, we think, rightfully) that the plaintiff owns to the line of ordinary high water. This is all that can be gathered from a careful reading of it, and all that is involved in this suit. The defendant's adverse possession, as set up in the answer, was not insisted upon at the hearing. Indeed, there is no evidence in the record showing or tending to show that defendant ever had or claimed possession of any land above the line of ordinary high water. From these views it follows that the decree of the court below should be affirmed, and it is so ordered. AFFIRMED.

Argued 14 April; decided 28 April, 1902.

HESSE v. BARRETT.

[68 Pac. 751.]

PREFERENCE BY INSOLVENT DEBTOR.

1. In Oregon the law is now settled that an insolvent debtor may prefer one creditor over another, if the transfer is to pay or secure an honest debt, and no secret benefit is reserved to the debtor. Transfers to relatives will be closely examined, but are not necessarily void: *Mendenhall v. Elwert*, 36 Or. 375, cited.

FRAUDULENT CONVEYANCES—GENERAL PRINCIPLES.

2. In determining the legality of an alleged fraudulent conveyance the courts inquire whether there was an adequate genuine consideration, and whether a secret benefit was reserved to the grantor—and unless at least one of these points is decided in the negative the conveyance must be sustained.

FRAUDULENT CONVEYANCE—BONA FIDE DEBT.

3. Where a son who was indebted to his mother and others transferred a large amount of property to his brother-in-law on condition that he would assume and pay the son's debts, and the brother-in-law thereupon executed his note to the mother for the amount of the son's debt to her, such note represented a *bona fide* debt.

SUFFICIENCY OF EVIDENCE.

4. The evidence in this case is quite satisfactory that full value was given for the property transferred.

FRAUDULENT CONVEYANCE—EXPECTATION OF BENEFIT.

5. Where an insolvent conveyed property to a *bona fide* creditor, receiving credit for the full value thereof, the fact that such debtor expected that such

property would be reconveyed to his children—there being no agreement for such reconveyance—did not render the conveyance fraudulent as to the other creditors of such debtor.

From Washington: THOMAS A. MCBRIDE, Judge.

Suit by H. W. Hesse against N. A. Barrett and others. From a judgment for plaintiff, defendant Lucinda C. Jackson appeals. REVERSED.

For appellant there was a brief over the name of *Thos. H. & E. B. Tongue*, with an oral argument by *Mr. E. B. Tongue*.

For respondent there was a brief and an oral argument by *Mr. Geo. R. Bagley*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to set aside a deed from defendants Barrett and wife to their codefendant Jackson, and a general assignment made by them for the benefit of creditors, on the ground that both instruments were made for the purpose of hindering, delaying, and defrauding creditors. The court below held the assignment valid, but the deed from Barrett and wife to Mrs. Jackson fraudulent and void, and from this decree Mrs. Jackson appeals.

The facts are that in July, 1894, the defendants Barrett and wife were largely indebted and practically insolvent. The defendant Mrs. Jackson, who is Mrs. Barrett's mother, held their note for \$11,400. Barrett and wife conveyed her the property in controversy, consisting of a house and two lots in Hillsboro, and 120 acres of farm land a few miles from the town, for an expressed consideration of \$6,000, which amount was credited on the note above mentioned. About a month later, they made a general assignment of the remainder of their property for the benefit of creditors. At the time of the conveyance to Mrs. Jackson, the Barretts were residing in the dwelling house and cultivating the farm. They harvested the crop in the ensuing fall, paying Mrs. Jackson one third thereof as rent, and have

ever since occupied the dwelling house as her tenants, paying rent therefor. The plaintiff and his assignors were creditors of the Barretts at the time of the conveyance to Mrs. Jackson, and the contention is that such conveyance was made for the purpose of hindering, delaying, and defrauding creditors.

1. The fact that Barrett was insolvent at the time is no ground for impeaching the transaction. Under our statute an embarrassed or insolvent debtor may prefer one creditor to another, and if the transaction be an honest one, and made in good faith, it is valid, even though the preferred creditor may be a relative: *Sabin v. Columbia Fuel Co.* 25 Or. 15 (34 Pac. 692, 42 Am. St. Rep. 756); *Currie v. Bowman*, 25 Or. 364 (35 Pac. 848, 44 Am. & Eng. Corp. Cas. 662); *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Inman v. Sprague*, 30 Or. 321 (47 Pac. 826); *Sabin v. Wilkins*, 31 Or. 450 (48 Pac. 425, 37 L. R. A. 465); *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22, 59 Pac. 805).

2. In the second edition of the American and English Encyclopædia of Law, the editors of that publication give this admirable and clear statement of the rule applicable to cases of this kind, and of the tests by which the good faith of the transaction is to be determined: "A failing or insolvent debtor, unrestrained by statute, may prefer and pay one or more of his creditors; and such conveyance will be upheld if the debt thus satisfied is *bona fide*, its amount not materially less than the fair and reasonable value of the property conveyed, and the payment of the debt is the sole consideration, and no use or benefit is secured or reserved to the debtor. In such case the inquiry should be directed to the *bona fides* of the debt, the sufficiency of the consideration, and the reservation of a benefit to the debtor. If the transaction is not assailable on some one of these grounds, fraud has no room for operation; and this though the effect of the preference is the hindrance and delay of all the other creditors of the debtor, or the deprivation of all possibility of their payment from his present assets": 14 Am. & Eng. Ency. Law (2 ed.), 226. The inquiry in this case should therefore be directed (1) to the question whether

the debt from the Barretts to Mrs. Jackson was *bona fide*; (2) whether the value of the property conveyed substantially corresponded to the credit allowed therefor; and (3) whether there was any benefit secured or reserved to the grantors.

3. Upon the first question there is no conflict in the testimony. Some time prior to 1888, Ulysses Jackson, a son of the defendant Mrs. Jackson, was indebted to her about \$10,000 for money borrowed. He was also indebted to other parties, and, in consideration of an agreement by the defendant Barrett to pay and discharge his debts, he transferred and conveyed to him a large amount of real estate. Barrett thereupon gave Mrs. Jackson his individual promissory note for the amount due her from Ulysses, and on June 3, 1890, he and his wife, in renewal thereof, executed and delivered to her their joint and several promissory note for \$11,400, due ten years after date, which note was outstanding and unpaid at the time of the conveyance in question.

4. Upon the second point, all the witnesses agree that the credit allowed by Mrs. Jackson on the note was the full value of the property. It is clear, therefore, that the debt in consideration of which the conveyance was made was *bona fide*, and the amount allowed for the property was its fair and reasonable value.

5. It remains to be seen whether there was any reservation of benefit to the grantors, and this constitutes the principal ground upon which the plaintiff asks to have the conveyance declared void. His contention is that it was understood and agreed between the Barretts and Mrs. Jackson at the time of the conveyance that she should take the property for the benefit of the children of the Barretts, and transfer it to them. The testimony upon which the plaintiff largely relies to sustain this position is Mrs. Barrett's, who seems to have been the principal actor in the matter, so far as she and her husband are concerned. She testified that, about a month before the deed was made, she suggested to her mother the advisability of taking the conveyance, whereupon, being asked if she had any agreement with her mother concerning the same, she replied:

“Well, the agreement was— I went to her and asked her— I talked to her about taking this land. Nate wanted to put another mortgage on the Dobbins place, and I asked her if she did not think it would be right for me to have something for my children, and she said she thought it would be right. That was before the deed was made, but the day the deed was made I didn’t have any conversation with her,—only just told her what we came for. * * She said she thought it was well enough for me to have something left for my children. I told mother that was the reason that we came with the deed.” She further testified that she expected her children to get the land, that it was deeded to her mother so she could hold it for them, and that she supposed, if anything happened, her mother would deed it back to the children; but she did not state that Mrs. Jackson ever agreed to, or acquiesced in, such arrangement. When Mrs. Barrett spoke to her husband about conveying the property to her mother, he agreed to do so, and thereafter had prepared a deed from himself and wife to Mrs. Jackson, and another from her to the children. The one from him and his wife was properly executed, taken by them to Mrs. Jackson’s house, and delivered to her, and she then and there caused a credit to be made upon the note of \$6,000,—the value of the premises; but she did not execute the deed reconveying the property to the children. Mrs. Barrett testified that this matter was broached when the deed from herself and husband was delivered, but Mrs. Jackson did not execute it, but said “she would do what was right.” Mrs. Jackson said she did not know of such a deed, and never agreed to execute it; that the land in controversy was deeded to her as a *bona fide* payment on the note she held against the Barretts; and that she did not agree to deed the property to their children; and never intended to do so. Mr. Barrett testified that he did not expect Mrs. Jackson to give the land to him or to his wife, but hoped she might deed it to his children, in view of the fact that she had previously given all her other property to his wife’s brothers.

It is evident from the testimony that the Barretts expected

or hoped that their children would ultimately receive the property, and they were no doubt prompted thereby to make the conveyance in question. But that of itself is not sufficient to justify the court in declaring the deed fraudulent and void, unless it appears that Mrs. Jackson, the grantee of the premises, was a party to the scheme. When a conveyance is assailed as fraudulent as against the creditors of the grantor, and the grantee is not a volunteer, both the fraudulent intent of the grantor, and notice thereof to the grantee, must be shown; and, in our opinion, there is no such showing in this case. The deed from Barrett and wife to Mrs. Jackson was an absolute conveyance, without reservation, and Mrs. Jackson never did convey or transfer the property to the Barrett children. There is no evidence that she did not receive the conveyance in the utmost good faith, so far as she was concerned, and as a payment on the *bona fide* indebtedness due her from the grantors. She positively denied that she ever agreed or promised to transfer the property to the Barrett children, and it is undisputed from the testimony that she had no knowledge at the time that Barrett was insolvent and unable to pay his debts. It is immaterial what motives may have prompted the Barretts in making the deed, nor is it of importance that they hoped and expected that their children might ultimately receive a benefit therefrom. To avoid the deed on the ground of fraud, there must have been not only an expectation on the part of the Barretts that Mrs. Jackson would convey the property to their children, but a promise on her part to do so. Even if she had thereafter deeded the property to the children, it would not have rendered the deed from the Barretts to her void, unless it was made in pursuance of a prior agreement, and in furtherance of a design to hinder, delay, or defraud creditors.

In *Young v. Dumas*, 39 Ala. 60, the supreme court of that state, speaking of a gift by a father to his daughter of property received from his son-in-law in payment of a debt, say: "Mr. Horn had the clear right to collect his demand, which we have seen was just, from his son-in-law, Mr. Dumas; and

after he thus became the owner of the property, his right to give that property to the sole and exclusive use of his daughter Mrs. Dumas, cannot be successfully controverted by the creditors of Mr. Dumas. As to them the gift was harmless. That the effect may have been to delay, and possibly defeat, all other creditors in the collection of their demands, cannot, of itself, avoid the sale." Again, in *First Nat. Bank v. Carter*, 89 Ind. 317, where one insolvent and largely indebted, in order to defraud his creditors, procured an uncle of his wife to buy his lands worth \$12,000 at sheriff's sale for that sum, upon an agreement that the uncle should, as he did, actually pay off the judgment for \$1,559.92, and convey the land to the debtor's wife, it was held that, because it did not appear that the uncle or wife had notice of the intended fraud, the creditors could not subject the land to the payment of their demands. So, also, in *McPherson v. McPherson*, 21 S. C. 261, where an insolvent conveyed his home place to his sister in payment of an antecedent debt, and she to another, in trust for the wife and children of such brother, who continued to occupy the place, it was held that if the deed to the sister was made without an agreement for the reconveyance, and was not induced by her promise to reconvey, but was really in satisfaction of the debt, the deed could not be avoided, even though the brother expected that his wife and children would receive some donation from his sister. We are of the opinion, therefore, that although the Barretts may have expected at the time of the conveyance by them to Mrs. Jackson that their children would receive some donation from her, or that she would subsequently convey the property to them, the deed cannot be avoided, because there is no evidence that Mrs. Jackson, prior to the receipt of the deed, or at any other time, agreed or contracted to make such a transfer, and it was really received by her as in part satisfaction of a *bona fide* debt due her from the Barretts: *Van Riswick v. Spalding*, 117 U. S. 370 (6 Sup. Ct. 788; *Bamberger v. Schoolfield*, 160 U. S. 149 (16 Sup. Ct. 225). The decree of the court below will therefore be reversed.

REVERSED.

Decided 30 June, 1902; modification denied.

OREGON CONSTRUCTION CO. v. ALLEN DITCH CO.

[69 Pac. 455.]

WATERS FOR IRRIGATION—PRIVITY WITH APPROPRIATORS.

1. Where persons who divert water do not surrender their rights to a company, but it is organized merely to facilitate distribution of the water among them, there is such a privity as to enable it to defend in their behalf.

PRESCRIPTIVE RIGHT TO WATER.

2. As against riparian owners, one who diverts water may acquire title by prescription in the same time necessary to acquire title to land by adverse possession.

USE OF WATER—APPROPRIATION—TITLE BY RELATION.

3. When the appropriation of a water right is initiated by the posting of a notice, the statute of limitations will begin to run at the date of the posting of such notice (*Nevada Ditch Co. v. Bennett*, 30 Or. 59, cited), but when it is initiated by an actual diversion without a notice, the statute is set in motion on the date of the diversion, provided in both instances that there is an application to a beneficial use within a reasonable time.

PRESCRIPTION—WHEN STATUTE OF LIMITATIONS BEGINS.

4. Prescription begins to run from the time one diverts water, though there is not then an actual use thereof, provided there is actual and exclusive possession and control with intent to use it, followed by actual use within a reasonable time.

ADVERSE USE—EFFECT OF OBJECTIONS.

5. Continuity of holding by persons who divert water is not interrupted by objection being made thereto, no attention being made to the objection.

CONTINUITY OF ADVERSE HOLDING.

6. There is no interruption of the continuity of holding of persons who divert water because others make a diversion by a canal into which for a while their water flows for a short distance, they again taking up the water and using it in defiance of the others' claims.

From Umatilla: WILLIAM R. ELLIS, Judge.

Suit for an injunction by the Oregon Land & Construction Co. against the Allen Ditch Co. Decree for plaintiff, and defendant appeals. REVERSED.

For appellant there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. J. H. Raley*.

For respondent there was a brief over the names of *Williams, Wood & Linthicum*, and *Jas. A. Fee*, with an oral argument by *Mr. Geo. H. Williams*.

MR. JUSTICE WOLVERTON delivered the opinion.

The plaintiff being the owner of 1,520 acres of land through which the Umatilla River, a nonnavigable stream, flows, seeks to enjoin the defendant from diverting any of the water thereof in disregard of its riparian rights. Formerly a slough at the mouth of Alkali Canyon, near the center of section 21, township 3 north, range 29 east, extended from the river in a northwesterly direction for one fourth to a half mile, skirting a rocky bluff in a semicircular form. About the year 1865 one Lowe and his brother constructed a ditch for some distance, to be used for floating logs and mining purposes, taking the water out of the northernmost end of the slough. What use was eventually made of it does not appear, and the brothers finally abandoned the enterprise. On the 12th of December, 1891, there was incorporated by M. C. Tribble, O. Teel, and Henry Baumgardner a company known as the Umatilla Meadows & Butter Creek Co., the initial purpose thereof being to build and construct a canal or canals for a system of irrigation on the Umatilla Meadows and Butter Creek lands in Umatilla County. The meadows are situated below the head of the proposed canal, along and to the west of the Umatilla River, extending down to the lands of the plaintiff, some five or six miles below, and Butter Creek is some eight or ten miles distant to the west and northwest. A portion of the canal was constructed in 1891 and 1892, the exact extent of which does not appear. For some distance below the mouth of the Lowe Ditch it occupied the identical course, but was extended along the slough, and connected directly with the river at the mouth of Alkali Canyon. Water was diverted through this ditch, and some use made of it from that source. A little later the Columbia Valley Land & Irrigation Co., a corporation of which W. W. Caviness was the president, constructed a large canal by increasing the capacity of the Meadow Ditch from its head down to what is known as the "drop" in the former, about a quarter of a mile below the head of the Lowe Ditch, from which it diverged, and continued in its own route

westward for a distance of six or seven miles; but the project was never completed. Water was turned into it in 1892, and the same use made of it in that year and the year following, when it was abandoned, and has since fallen into disuse. The Allen Ditch Co., defendant, having incorporated October 12, 1892, with O. Teel, M. C. Tribble, and M. T. Allen, as incorporators, subsequently constructed a ditch from the drop to the river, intersecting it 288 feet below the head of the Columbia Valley Ditch. Below the drop it utilized the Meadows Ditch, perhaps as far as the latter was constructed, and continued upon the lines of the old Lowe Ditch. At some distance below the drop the ditch divided into two branches, one running near the river for a distance of three miles or more from the head, and the other to the westward for a distance of about four miles.

No privity of estate has been shown between any of the incorporations, and no attempt has been made to establish any, except there is some evidence that the Columbia Valley Co. purchased the right of way of the Meadows Ditch, and the parties owning the latter became interested to some extent in the former. J. H. Koontz testifies that he transferred his stock to the Columbia Valley Co. in consideration of an agreement upon its part to furnish him 140 inches of water for irrigation. He was then living on the place subsequently purchased by Fred Andrews. Later he became interested in the Allen Ditch, and used the water, as needed, from all three of the company ditches; and when he sold to Andrews assigned to him his interest in the Allen Ditch. The plaintiff contends that no water was ever used through any of these ditches prior to 1890, and not until within ten years of the time this suit was instituted, to wit, May 5, 1900. The defendant's title is based upon a prescriptive right,—that is diversion and adverse user for a period of more than ten years last past,—and that constitutes the principal question in the case. The defendant does not claim to be the owner of the water, or have any right to use it, but that it is a managing concern for its better control and distribution among those entitled to it. There was an attempt

by the company to make an appropriation in 1892, but all title through that source is abandoned, and the sole reliance for present title is based on a prescriptive right or usage for more than ten years by individual citizens having an interest in the company. These claimants are Moses Tribble, Fred Andrews, M. T. Allen, Elvira Teel, B. F. McCullough, C. J. Ward, B. F. Raley, Henry Baumgardner, John Boyce, W. H. Babb, Twig Teel, and J. H. Leasure. There is some positive testimony that no water was conveyed through any of these ditches, including the Lowe Ditch, prior to 1890.

Mr. Koontz testifies that he assisted in the construction of the Meadows Ditch, and that there was then no water running in the Lowe Ditch, and but slight traces left of the ditch itself. There is other evidence of like import. Upon the other hand, however, there has been such an array of witnesses asserting to the contrary that it must be conceded as a fact that the Lowe Ditch, or such as the farmers enlarged and extended, carried water long prior to 1890. M. C. Tribble testifies that water has been flowing through a ditch within a quarter of a mile of his house since he began living there in 1877; that the ditch led to what is known as "Teel's Lower Place," and through Baumgardner's place down the other way, and came from the mouth of Alkali Canyon, practically where the Allen Ditch Co. takes its water; that the ditch referred to has been known as the "Lowe Ditch;" that Dr. Teel cleaned it out at that time, and has been using water therefrom more or less ever since; that after the Lowes left, witness, Teel, Templeton, and others, and the neighbors generally, worked on the ditch, and that about the same volume of water has been flowing through it from that time to this; that witness is one of the original incorporators of the Allen Ditch Co., and that the persons composing it were Teel, Allen, Koontz, Mrs. Elvira Teel, and himself; that the farmers claim the water distributed through the ditch, and that the original appropriators have never sold to the company. O. Teel testifies that prior to 1877 water was conveyed by a ditch through lands at present owned by his mother, Tribble, and Allen, and onto his father's place, being

the southwest $\frac{1}{4}$ section of section 7, situate three miles and a half from its source; that part of it ran through the locality of Fred Andrews' place; that Jonathan Raley and other neighbors assisted in building the ditch; that the water was supplied from the slough, which was fed from the river, and that he has been using it on the place where he lives, near the head of the ditch, continuously since 1887 or 1888 for irrigation and stock purposes; that the water was formerly used on section 7 for irrigation, but within the last year has been used only for stock purposes; and the capacity of the ditch is now somewhat greater than it was in 1890. M. T. Allen testifies that water has been flowing to his place through the ditch since 1889, and that he has used it for his stock and irrigation. William Coffman says that water was flowing through the ditch in 1886; that there was a prong to it, and that part of the water ran through Tribble's place and part in a westerly direction. Henry Baumgardner states that he knew of the Lowe Ditch, and that water came down in it prior to 1890, that Allen was taking water out of it down through his place in 1889; and that witness irrigated an orchard and used water from it for stock purposes. Asa Thompson testifies that he has known of water running through the ditch off and on all the time since 1883, but could not say whether it continued during the dry season. B. F. Raley says that when the Lowes left the ditch partly finished others took hold of it, and extended it further down, and took out the water; that witness, his father, and Teel and his boys worked on it in 1868 and 1869, and that the water has continued to flow through it and over the lands most of the time. John Boyce testifies that he left Teel's place in 1877, and that water was running in the ditch at the time, and has continued ever since; W. H. Babb, that he has been running it down to his place continuously since 1889; and J. H. Bobbins, Twig Teel, J. B. Stanley, Levi Gill, and T. C. Smith, that water was running through the ditch prior to 1890; so that, to our minds, it is clearly established that the ditch, as now used by the Allen Ditch Co., was utilized prior to that date for the distribution of water among the farmers inter-

ested therein. This establishes the diversion more than ten years prior to the institution of this suit.

Now, as to the use. Prior to 1890 it is probable that there was but little of the water used for irrigation in the ordinary way. There was some subirrigation, and much of it utilized for stock and domestic purposes. M. C. Tribble began the use to some extent prior to that time, even as far back as 1877, and has since reduced to cultivation from 80 to 90 acres of his land, and irrigates the same, together with an orchard and shrubbery. O. Teel began the use at the upper Teel place in 1887 or 1888, and now irrigates from 170 to 180 acres; and at another place he utilizes the water for stock purposes, and until recently for irrigation. M. T. Allen uses it for irrigating 30 acres of alfalfa, besides other ground for grain, orchard, and shrubbery. Fred Anderson uses it on 50 acres or more; T. C. Smith on 40 to 50 acres; Dr. C. J. Smith on 60 to 70 acres; and others might be mentioned, but, suffice it to say, the evidence shows that the water is now employed for irrigating 600 acres or more, besides orchards and shrubbery, and for stock and domestic purposes. Out of the 600 acres, the use for 120 or thereabouts is paid for at the rate of \$1.50 per acre by individuals who were not concerned in the construction of the ditch and the diversion, or have not succeeded to the rights of those who were. Of course, some of the persons instrumental in making the diversion have since parted with their lands, but the use of the water has continued appurtenant thereto, and the present owners have thereby acquired the rights of their predecessors.

1. All the original owners concur in their testimony that in the formation of the Allen Ditch Co. none of them surrendered their water rights previously acquired to the company, and that it was organized merely to facilitate the distribution of the water among those entitled thereto; that they have been selling the use of some water when not employed by those entitled to it, and that the recompense has been expended in keeping the ditch in repair, and not as a matter of profit to the concern. These conditions show such a privity between the

Allen Ditch Co. and the farmers, or original claimants, as to enable the former to maintain its defense in their behalf. That the water has been of great utility to the territory in proximity to the ditch is unquestioned. Houses and barns have been constructed, and many acres of land reduced from its wild and arid condition to a high state of cultivation. Orchards, shubbery, and ornamental trees have been planted, and the community is described as thriving and prosperous. The use of the water is absolutely essential to the maintenance of the present condition. But, notwithstanding all this, if the plaintiff has a better right, under the law, to have it flow down the channel of the river, through and beyond its lands, by reason of its riparian ownership, than the farmers have to use it by virtue of a prescriptive right, the injunction should be maintained; otherwise not.

2. The plaintiff's riparian right to have the water flow in the stream undiminished in quantity, except by the reasonable use thereof by riparian proprietors, is appurtenant to the land, running with it as a corporeal hereditament. Adverse possession to realty may have its inception in trespass, and naked possession under a claim of right actual, hostile, open and notorious, exclusive, and continuous for a period of ten years, will, in this state, ripen into a perfect title: 1 Am. & Eng. Ency. Law (2 ed.), 795; *Joy v. Stump*, 14 Or. 361 (12 Pac. 929); *Altschul v. O'Neill*, 35 Or. 202 (58 Pac. 95). If the riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which becomes thereby the dominant estate, and the grant an incorporeal hereditament. If title be acquired by prescription, the estate and the right are the same. So that we are confronted with the anomalous proposition that plaintiff has lost a corporeal hereditament appurtenant to its land by reason of the operation of the statute of limitations, and the defendant has acquired an easement or corporeal hereditament appurtenant to its lands by virtue of the same statute; in other words, that the statute has operated to convert a corporeal hereditament into

an incorporeal hereditament, and at the same time to divest plaintiff of the one and invest defendant with the other. Says Mr. Justice CURREY, in *American Co. v. Bradford*, 27 Cal. 360, 366: "The general and established doctrine is that an exclusive and uninterrupted enjoyment of water in a particular way for a period corresponding to the time limited by the statute within which an action must be commenced for the recovery of property or of the assumed right held and enjoyed adversely becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been but was not asserted." The term "prescription," strictly speaking, is applicable only to incorporeal hereditaments, and not to land. Anciently, in order to support a title by prescription, the use of the incorporeal right must have continued immemorially; that is, have had a commencement before the reign of Richard I., but latterly it came to be held that a continuous use in a particular manner for twenty years corresponding to the period usually prescribed by statutes of limitations for entry upon lands was sufficient for the purpose: Gould, Waters (3 ed.), § 329. In analogy to this principle, the acquirement of a prescriptive right has come to be measured by the statute of limitations for the recovery of real property, and such is the rule in this state: Kinney, Irr. § 295; *Dodge v. Marden*, 7 Or. 456.

3. Plaintiff's riparian rights have been invaded by the diversion. This suit is based upon that idea, and there can be no further controversy relative thereto. But the point of time when the invasion commenced so as to set the statute of limitations running is yet a matter of inquiry. To render the enjoyment of any easement exclusive evidence of right, it must have been continued, uninterrupted, or pacific and adverse; that is, under a claim of right, with the implied acquiescence of the owner: 3 Kent, Comm. p. 434. It is said that the rules of law governing the acquisition of a right by prescription in a case where it is to run against the rights of a riparian owner are similar to those governing where the prescription is to run against a prior appropriator: Kinney, Irr. § 295. In *Huston*

v. *Bybee*, 17 Or. 140 (20 Pac. 51, 2 L. R. A. 568), Mr. Justice THAYER says: "The proof must establish an exclusive use of the water under a claim to so use it;" and Mr. Justice Fox, in *Alta L. & Water Co. v. Hancock*, 85 Cal. 219, 223 (24 Pac. 645, 20 Am. St. Rep. 217), says: "Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under a claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of a riparian appropriator. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire right by prescription this advantage: that it gives the prior claimant notice that his user is adverse, and under claim of right, and sets the statute in motion against such prior claimant." So the court say in *Smith v. North Canyon Water Co.* 16 Utah, 194 (52 Pac. 283, 286): "The right of the defendant in the water would become fixed only after seven years' continuous, uninterrupted, hostile, notorious, adverse enjoyment; and, to have been adverse, it must have been asserted under the claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. * * The possession must have been actual occupation, open, notorious, hostile, and under a claim of title exclusive of any other right." This principle has been reaffirmed by the same court in *Centre Creek W. & Irrig. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. 559), the language there employed being that "the possession must have been actual occupation and use." The adverse holding of land and of an easement constituting the use of water are exactly parallel, so far as the similarity of the property will admit of it. As to land there must be actual occupancy, but the condition may be fulfilled either by *pedis possessio* or constructively, if the holding is under color of title. Literally, there can be no occupancy of water. There may be a use of it; and some of the authorities above cited seem to indicate that, to be adverse, the use must be actual, which would seem to imply that all the water must have been put to a beneficial use by the claimant from

the inception of the adverse right. The manner of making a prior appropriation in this state is now well understood. Three elements must exist,—an intent to apply the same to some beneficial use, diversion, and an actual application within a reasonable time to some useful industry: *Low v. Rizer*, 25 Or. 551 (37 Pac. 82). If the appropriation is initiated by notice, and there is a diversion within a reasonable time, and application to a beneficial use made within a reasonable time after the diversion, it will be deemed to have been made as of the date of the notice given; but, if there is no notice, it will be deemed to have been made as of the date of the diversion: *Nevada Ditch Co. v. Bennett*, 30 Or. 59 (45 Pac. 472, 60 Am. St. Rep. 777). In such a case there is only constructive use of the water until actually applied, which completes the appropriation. It was said in the case last cited that “all rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation; but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature.”

4. Now, if actual diversion, followed within a reasonable time by application and actual use, is sufficient for the inception of a valid prior appropriation, why is it not sufficient to set in motion the statute of limitations? The rights of the prior appropriator or riparian owner have been invaded, and he has been deprived of the use of the water, for which he has an action against the trespasser, and the possession passes absolutely under the control of the one making the diversion. There is a claim of right arising from the attempt to make the appropriation, so that this essential to adverse possession is subserved. The other essentials—that it must be open, notorious, exclusive, and continuous—are not incompatible with this kind of possession; so that all the elements of the statute to make it effective are complied with, unless it be that the use must be actual in the exact literal sense of that term. But we do not think that such is the requirement of the law. If there is a diversion, followed by actual and exclusive possession and

control, such as will constitute an invasion of prior acquired rights, with the intent and purpose of applying the water to some need or useful purpose, and there is actual application within a reasonable time, such as will serve to complete a valid prior appropriation, there is such a user as will set the statute of limitations in motion, and, if continued for the statutory period, will confer a valid title to the easement. This is in harmony with the method for the acquirement of water rights by prior appropriation, and is a logical deduction from the principles by which they are sustained and upheld, and would seem to be reasonable and just.

In this view the farmers whom the defendant represents are entitled to so much of the water as they are now employing for a useful purpose. Most of it was so employed early in the last decade, and has been continuous to the present time. Several witnesses state that about the same quantity of water flowed in the old Lowe Ditch as is now being carried by the Allen Ditch, and some are of the opinion that the latter carries more by a fourth. All of that which is carried seems to be used, but a portion is being sold to outside parties, as we have seen. The defendant claims 2,400 inches, but the evidence adduced does not establish its title to this amount. One or two witnesses testify that the ditch, a short distance below the head gate, carries to the depth of two feet, being eight feet or more in width. Mr. Kimbrell, one of the plaintiff's witnesses, a surveyor and civil engineer, says he measured the water at the head gate, and that it was one foot deep by seven and a half feet in width. The measurement was taken eight feet below the head gate. But he further states that the water was nearly two feet in depth above the head gate, and that there must have been one foot pressure. This is the most definite statement that we find in the record as to the amount of water being diverted. An orifice seven and a half feet by one foot with a 6-inch pressure will probably pass down to the defendant about the amount of the original diversion, thus giving it 1,080 miners' inches, as understood by many persons of practical experience, and not more than that, to which it is entitled.

5. Another question is pressed, which is that the holding has not been continuous. This is based upon the testimony of Hunt and Hamilton, whereby it appears that in 1885 Hunt made an objection to the defendant taking the water out of the river, addressing it to O. Teel, the secretary of the defendant company. Teel denies that any such objection was made; but, whether there was or not, it was not of such a nature as to break the continuity. The diversion continued, and neither Teel nor the company acceded to the demand, or paid any attention to it, but proceeded with the assertion of their right and the exercise of authority and control over the use of the water diverted. The objection amounted to nothing more than the mere denial of the defendant's right, and this was insufficient. "Mere denials of the right, complaints, remonstrances, or prohibitions of user, unaccompanied by any act which in the law would amount to a disturbance, and be actionable as such, will not prevent the acquisition of a right by prescription: Gould, Waters, § 332; Long, Irr. § 91; *Cox v. Clough*, 70 Cal. 345 (11 Pac. 732); *McGeorge v. Hoffman*, 133 Pa. 381 (19 Atl. 413).

6. There is evidence tending to show that for a while in 1892 and 1893 some of the interested parties, represented by defendant, used water from the Columbia Valley Ditch, but this was not a recognition by them of any right it had to divert such water. They used it in defiance of the alleged rights of the company, and because it had in the construction of its ditch interfered with the regular flow of the water in their ditch. It may have been that for a while all the water claimed by defendant passed into the big ditch, and flowed therein for a short distance, and was taken up again by the claimants; but these circumstances do not alter the case. There was no recognition by defendant of any rights antagonistic to its claim, or those for whom it is the agent and intermediary, and the controversy was not such as to break the continuity of its holding.

We have not considered the rights of any of the parties whom the defendant represents as riparian owners. Under

the pleadings, as they have come to us, it is doubtful whether such a question could be properly urged, and the defendant's rights are dependent entirely upon the statute of limitations; but, as we have seen, the statute has run in its favor, thus giving it title by prescription to the amount of water that will flow through an aperture $7\frac{1}{2}$ feet by 12 inches under a 6-inch pressure, and the decree of the court will be that defendant be enjoined from a diversion of any larger amount. The appellant is entitled to its costs and disbursements, both in this and the trial court.

MODIFIED.

Decided 3 June; rehearing denied 3 November, 1902.

BROWN v. CASE.

[69 Pac. 43.]

FRAUDULENT CONVEYANCE—EVIDENCE OF SOLVENCY.

1. Evidence held sufficient to show that a grantor of realty was solvent at the time he executed a conveyance for a consideration possibly somewhat inadequate.

CREDITOR'S BILL—GRANTOR'S INSOLVENCY.

2. A debtor's voluntary conveyance may be set aside at the suit of creditors without proof that the debtor believed himself insolvent at the date of the conveyance, if his solvency at the time was contingent on the stability of the market in the business in which he was engaged.

INADEQUATE CONSIDERATION DOES NOT MAKE A TRANSFER VOLUNTARY.

3. Where a conveyance is made by a grantor who is indebted at the time, upon a valuable consideration that is inadequate, such inadequacy does not render the conveyance voluntary.

EVIDENCE OF ADEQUACY OF CONSIDERATION.

4. The evidence herein is fully reviewed and the conclusion reached that the grantor was solvent at the time the conveyance in question was made, and that he received a valuable consideration therefor.

RELATIONSHIP OF PARTIES—FRAUD—BURDEN OF PROOF.

5. In a creditors' suit to set aside a transfer of realty from the debtor to his sister, the relationship between grantor and grantee imposed upon her the burden of showing that she paid a valuable consideration, and took without notice of any intention to prejudice creditors.

FRAUDULENT CONVEYANCE—ADEQUACY OF CONSIDERATION.

6. Where realty worth \$11,000 was by one who shortly afterward became insolvent transferred to his sister for an expressed consideration of \$11,000, consisting of \$7,500, which was in fact paid, and an agreement to care for the grantor during his life, the inadequacy of consideration was not so great as to shock the conscience of the court, and render the deed void as to creditors.

From Clatsop: THOMAS A McBRIDE, Judge.

This is a suit to set aside a deed of real property. The facts are that on December 31, 1892, I. W. Case, for value, executed to Hiram Brown his promissory note for the sum of \$14,392.69, payable in two years, with interest at 7 per cent per annum, and on March 28, 1893, for the expressed consideration of \$11,000, conveyed to his sister, the defendant herein, lots 7, 8, and 9 in block 115, Shiveley's Astoria, the deed thereto being recorded May 29th of that year. Case, being the owner of a bank at Astoria, was compelled to suspend business July 29, 1893, by reason of the failure of his correspondent, the Commercial National Bank of Portland; and, a suit having been commenced against him to recover an alleged special deposit, a receiver was appointed, but, that suit having been settled, Case secured an extension of time from his creditors that enabled him to open his bank December 23, 1893, and resume business, which he continued until August 1, 1894, when he executed to D. K. Warren a deed of general assignment. His said note remaining unpaid, Brown commenced an action thereon in the circuit court for Clatsop County, and caused the lots so conveyed to the defendant to be attached. Case died testate February 3, 1895; and Duncan Stuart was appointed and duly qualified as executor of his will, and, being made a party defendant in said action, judgment was rendered in Brown's favor February 21, 1895, for \$17,754.50, and said lots ordered sold. The assignee, having converted Case's assets into money, was enabled to pay on said judgment only the sum of \$9,543.58. Brown died testate March 9, 1898, and the plaintiff, C. S. Brown, having duly qualified as executor of his will, instituted this suit July 29, 1899; but said estate having been fully settled, and the executor discharged, the court, May 25, 1899, upon a petition showing that plaintiff was a son, and Annie Wilkinson, a daughter, of Hiram Brown, deceased, and his residuary legatees, substituted them as parties plaintiff, whereupon they filed an amended complaint, alleging, in substance, the facts as hereinbefore stated, and that

Case, without any consideration therefor, and with intent to defraud his creditors, executed his said deed to the defendant.

The answer denies the material allegations of the complaint, and avers that about August 1, 1899, Case was indebted to the defendant for money had and received to her use which upon an accounting amounted to \$5,000, including interest, and he, being in poor health and subject to epilepsy, which at times rendered him unable to care for himself, agreed with her that in consideration of said debt, and of her promise to live with and care for him as long as he lived, he would convey said lots to her, and that, relying thereon, she faithfully kept her part of the agreement until he died, which service was reasonably worth the sum of \$2,500, and that she accepted the deed to said lots without notice of any intention on his part to hinder, delay, or defraud his creditors. For a further defense it is alleged that, at the time said deed was executed, Case was solvent, and owned and possessed property in Oregon, subject to execution, sufficient to discharge all his liabilities without resorting to the lots in question, the value of which at that time did not exceed \$9,000. The reply having put in issue the allegations of new matter in the answer, the cause was referred to Charles E. Runyon, who took the testimony, from which the court found, *inter alia*, that Case was insolvent when he executed the deed to the defendant; that she gave no consideration therefor, and accepted the conveyance of the premises pursuant to a secret understanding that she would hold the title thereto for his use and benefit, and to prevent his creditors from attaching and levying executions thereon; and, having rendered a decree as prayed for in the complaint, the defendant appeals.

REVERSED.

For appellant there was a brief over the name of *J. H. & A. M. Smith*, with an oral argument by *Mr. John H. Smith*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Charles W. Fulton*.

MR. JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

It is contended by defendant's counsel that Case was solvent when he executed the deed to the defendant, and that the court erred in setting it aside. The testimony discloses that I. W. Case for about ten years prior to July 29, 1893, had been the sole proprietor of a bank in the City of Astoria, and, by the careful management of his business, had won the confidence of his patrons, and was ranked high in financial circles. About 1889, however, the value of real property in and surrounding that city began to advance in consequence of a general belief that a railroad would soon be built thereto, thus affording better facilities for transporting to an Eastern market the lumber manufactured and the vast quantities of salmon annually canned there, and for bringing wheat, flour, wool, hops, and other inland products to the city, to be carried in ships from its wharves to foreign ports. This appreciation of land caused speculation therein, and induced Case to join others in purchasing tracts which they caused to be surveyed and platted for the purpose of selling the lots and blocks laid out thereon when their hopes of railway communication and the advantages resulting therefrom would be fully realized, thus rendering their investments profitable. Hiram Brown in 1889, being the owner of 60 acres of unimproved land, situated about a mile south of the business center of the city, and having about 3,000 feet of water front, sold and conveyed the same to I. W. Case, J. H. Gray, and two others for the sum of \$60,000, each taking an equal interest therein, and the land so purchased was platted as "Case's Astoria." Gray not having paid his part of the purchase price, Case, for his accommodation, gave Brown his promissory note, as hereinbefore stated, taking Gray's note, January 2, 1893, for the sum of \$12,942.64, secured by a mortgage of his interest in Case's Astoria and other property. A transcript of Case's ledger, offered in evidence, shows that his assets, March 28, 1893, were valued by him at \$346,377.07, and his liabilities stated to be

\$308,131.35, leaving an excess of assets of \$38,245.72; but the note to Brown for \$14,392.69 was not included in his liabilities, nor was any credit given for Gray's mortgage note of \$12,942.64. It is quite probable, however, that the omission to enter these items was due to the belief that one would offset the other; but, however that may be, it appears from the testimony that the excess of assets should be reduced by the difference between the two notes, or to the extent of \$1,450.05. A part of Case's assets, as disclosed by his ledger, consisted of certain lots and improvements thereon at Astoria, and known as the "Occident Packing Company's Cannery," and certain other lots and blocks in Case's Astoria, and one fourth of the water frontage thereto, valued as an entirety by him at \$34,492.17. The testimony shows that the cannery was sold for \$15,000, and, if it be assumed that the value placed thereon by Case was realized, the remaining lots and blocks must have been appraised at \$19,492.17. This assumption may well be doubted, however, for in the inventory annexed to the assignment his interest in Case's Astoria is valued at \$13,720.59.

The assignee, being desirous of securing for the creditors the best possible prices for the property committed to his charge, delayed the sales thereof until a railroad was constructed to Astoria from Goble, connecting with the Northern Pacific Railway from Tacoma to Portland, hoping thereby to be able to realize a sufficient sum to discharge the liabilities of the estate; but upon the sale of such interest in the lots and blocks in Case's Astoria he realized only the sum of \$1,227.95, thus failing to secure the appraised value of the entire property by \$18,264.22, and entailing a diminution of the "excess of assets," as disclosed by said inventory, of \$12,492.64. Gray's mortgage to Case having been foreclosed, a few of the lots in Case's Astoria were sold under the decree September 5, 1895, for the sum of \$485; but the assignee, not receiving such offers for the remaining real property as he considered it worth, bid it in for the estate at the sum of \$10,360, and thereafter he and Gray and his wife conveyed the property so pur-

chased by him to J. E. Higgins in trust, the contract in pursuance of which the deed was executed containing the following recital: "Whereas, all parties hereto believe that, if the said premises so purchased by the first party at such sale can be sold at private sale from time to time in separate parcels or otherwise, a sum sufficient to pay the entire amount of said judgment and decree, less the amount paid thereon by the sum bid at such sale by parties other than the first party, can be realized." The property conveyed to Higgins was sold at public auction August 30, 1897, for the sum of \$2,862.75, thus failing to secure the sum specified in the decree of foreclosure by \$9,594.89. The assignee at the same time and in the same manner also sold the lots in Case's Astoria conveyed to him by the assignor, and the greatest sum secured for a lot therein either under the decree of foreclosure or from Case, was \$17.50, while the lowest was \$3.50. Case owned three buildings at Astoria, erected on the land of others, for the use of which he paid a monthly rent. These buildings, appraised by him at \$10,000, were sold by the assignee for the sum of \$1,800, thus reducing the "excess of assets" to the extent of \$8,200. The assignee, having foreclosed several mortgages upon real property other than Gray's failed to realize from the sale thereof the face value of the mortgage notes by \$7,488.73. He lost upon bills receivable the sum of \$16,336.15; upon stocks, \$12,646.61; upon an account for coal, \$616.03; and upon bank furniture, \$3,886.33; thus failing to realize the values placed by Case on his property, as appears by his ledger account of March 28, 1893, by the sum of \$78,483.01, so that, instead of having an "excess of assets" of \$38,245.72, there was a deficiency, after the forced sale of his property, of \$40,237.29.

1. It is maintained by defendant's counsel that, notwithstanding this deficiency after such sale, Case was not insolvent March 28, 1893, and that, if the assignee had been more expeditious in disposing of the assets of the estate, he could have realized therefrom a sufficient sum with which to pay all its liabilities. The testimony shows that the building of a rail-

road from Astoria to Portland by way of the Nehalem Valley was commenced in 1892, and several miles of roadbed graded, but in the fall of that year the person having the contract for its construction having failed, the prosecution of the work was soon thereafter discontinued. It does not appear, however, that such suspension resulted in the immediate diminution of land values at Astoria, for the owners of real property in that city, believing that the work already done on the line of the selected route would be sufficient to induce other persons interested in railway construction to complete the proposed road, demanded the same prices for their lots and blocks in the suburbs as had been asked therefor during the excitement incident to the commencement of the work. The assignee undoubtedly entertained such an opinion, as is evidenced by the recital in the contract in pursuance of which the real property mortgaged by Gray to Case was conveyed in trust to Higgins. The testimony tends to show that the lots in Case's Astoria were worth \$75 each, March 28, 1893; that the water front of that addition to the city was worth \$4 a foot; and that, if Case's interest in the premises could have been sold at that time, a sum could have been realized therefor equal to his appraisement thereof. C. R. Thomson, defendant's witness, in speaking of the sum that Case could have realized if he had sold his property immediately after closing his bank, says: "He could have got three times as much, at least, if he had got out and advertised it a short time,—a week or ten days. I am satisfied he could have got at least three times as much as he did get for it." George Hill, another witness for the defendant, in speaking of the sale of this property, in connection with the assets of Case's estate, says: "Even at the time he failed, if it had been disposed of at the figures at that time, he could have paid out easy enough." The testimony also shows that the proceeds of Gray's interest in Case's Astoria and other property mortgaged to Case would more than have paid the mortgage debt, if the lots could have been sold at that time.

Frank Patton, cashier of the Astoria Savings Bank, as plaintiff's witness, referring to the receiver's report filed September 18, 1893, in answer to a question concerning Case's financial condition at the time, says: "He certainly was insolvent when this statement was made." S. S. Gordon, the cashier of the First National Bank of Astoria, in response to a similar inquiry, expresses opinion that Case's liabilities exceeded his assets at that time by \$21,000. C. R. Higgins, the cashier of the Astoria National Bank, in answer to an inquiry relating to Case's financial condition in March, 1893, says: "In my judgment, the assets don't seem to be ample to cover the liabilities, as there was so little change between that time and the time of the assignment,—the way the largest amounts were listed. If I may be allowed to express my reason for that opinion, it is probably biased a little by the knowledge of the way things went afterwards, which I consider was handled as properly as it could be by anybody. It was nursed along by the assignee. The property was bid in by the assignee himself, to save it from being sacrificed, and was held as long as it could be on account of the creditors pressing for their money; and, as the thing came out, for that reason I should judge the property was listed too high." John Bryce, defendant's witness, who had been a bookkeeper in Case's bank, in answer to the question, "Do you know what his financial condition was in March, 1893, as to his being solvent?" replies, "I should say that he was perfectly solvent in '93." Duncan Stuart, who had been in Case's employ as a clerk, in reply to the inquiry, "Will you state whether or not Mr. Case was solvent on the 28th day of March, 1893?" says, "Yes, sir; I considered him so." These witnesses are corroborated by the testimony of C. R. Thomson, who says, concerning Case's financial condition, "I will state in my opinion he was solvent at that time." George Hill, a real estate agent, in answer to the question (referring to Case), "Was he generally considered to be solvent at the time of the assignment?" replies, "Yes, sir." A. L. Ross, defendant's son, who had been employed by Case in his bank, was asked the following question:

"Do you know whether he was solvent at the time he closed his doors?" to which he replies, "I think most assuredly he was." The opinion of Patton and Stoddard in respect to Case's insolvency is limited to September 18, 1893, but it will be remembered that his deed was executed March 28th of that year. Higgins, however, says there was but little change in the conditions between the time the deed was executed and when the assignment was made. This witness admits, with much candor, that his opinion may be warped by the knowledge of the subsequent disposition of the property. The witnesses who expressed a different opinion concerning Case's pecuniary condition confine their judgment to the day on which the deed was executed. After a careful consideration of the entire record, we think we are warranted in saying that the testimony of Bryce, Stuart, Thomson, Hill, and Ross, whose opinions and the reasons therefor are limited to the date of the deed in question, outweigh that of Patton, Gordon, and Higgins, whose opinions refer to a later date.

2. At the time Case executed the deed to the defendant he had in his bank vaults, in cash, the sum of \$18,800.73, and city and county warrants and school bonds, immediately convertible into cash, of the value of \$19,827.95; and we think the testimony clearly shows that he did not then anticipate closing the doors of his bank, which was thereafter made necessary by the failure of his correspondent, the Commercial National Bank of Portland. If Case's deed were voluntary, however, it would not be necessary, in a suit by his creditors to set it aside, that he should have believed himself insolvent at the time of the grant; it being sufficient if his solvency was contingent upon the stability of the market in the business in which he was engaged: *Carpenter v. Roe*, 10 N. Y. 227; *Potter v. McDowell*, 31 Mo. 62; *Richardson v. Rhodus*, 14 Rich. Law, 95; *Weeks v. Hill*, 88 Me. 111 (33 Atl. 778); *Kehr v. Smith*, 87 U. S. (20 Wall.) 31. In *Rose v. Dunklee*, 12 Colo. App. 403 (56 Pac. 342), Mr. Justice BISSELL, in announcing the rule for determining the financial condition of a grantor who has conveyed his property to another without receiving a valuable

consideration therefor, says: "Whenever the amount of the property so closely approximates the amount of the liabilities that the conveyance would have a direct tendency to impair the rights of creditors if they should attempt to force collection by judicial process, the debtor is adjudged insolvent. The better way to ascertain the real worth of the property is to look at the results, rather than at the evidence of witnesses concerning value. If in the end, as the result of the situation, it turns out that the debtor is insolvent and owes more than he is able to pay, this is taken as sufficient evidence of his insolvency, as to existing creditors, to permit them to attack a voluntary conveyance. The property which must remain to the debtor after such transfer must be, as some of the cases put it, clearly and amply sufficient to satisfy his debts; and it is enough in such a case to show that the grantor was embarrassed and in doubtful circumstances, and his solvency may be judged by what happens."

3. Where, however, a conveyance is made by a grantor who is indebted at the time, upon a valuable consideration that is inadequate, such inadequacy is evidence, though not conclusive, of fraud, but does not render the conveyance a voluntary one: *Washband v. Washband*, 27 Conn. 424; *Mathews v. Reinhardt*, 149 Ill. 635 (37 N. E. 85).

A careful examination of the testimony leads us to believe, as will hereinafter appear, that defendant paid a valuable consideration for the property, and secured a deed therefor without notice of any intention upon Case's part to hinder, delay, or defraud his creditors; but, inasmuch as the consideration may have been somewhat inadequate, we have deemed it proper to consider the question of Case's financial condition, and think, if the lots in Case's Astoria could have been sold in the ordinary course of business (*Bank v. Cook*, 95 U. S. 342), and within a reasonable time after March 28, 1893, a sum equal to his appraisement of that property could have been secured, and that he had sufficient assets, which, if converted into money in the manner indicated, would have paid all his debts.

4. This brings us to the question of consideration alleged

to have been paid for the premises. The defendant, as plaintiff's witness, testified that her father, who formerly lived at Richmond, Indiana, being dissatisfied with her choice of a husband, gave her no dowry, while he materially aided his other children when they left home; that about nine years after her marriage she moved to Iowa, and never again saw her father, though she had heard that he moved to Missouri, and had also been informed that her brother, I. W. Case, came out West, but she did not know where he settled, and had not seen him for twenty-six years, until 1881, when she met him at Des Moines, Iowa, and was then informed by him that her father died at Richmond, Indiana, in 1867, and that he had conveyed to him a farm in Missouri, with instructions to sell it, and from the proceeds thereof to pay her the sum of \$2,000; that, though she was then in very moderate circumstances, she did not desire the bounty thus provided, for, if she then received the money, her husband would squander it; that, having secured a divorce and resumed her maiden name, her sons gave her \$500, with which she purchased their father's interest in her home in Iowa, and after keeping boarders in that state until she had accumulated a few hundred dollars, and placed the same in a bank, she came in 1889 with her son A. L. Ross to Vancouver, Washington; that she went to Astoria in July of that year to visit her brother, where she remained about ten days, and on preparing to return to Vancouver he proposed that, if she would remain with and care for him while he lived, he, in consideration of such services, and of the money so received from her father to her use, which, with the interest, then amounted to about \$5,000, would convey to her the lots in question as soon as he could secure a divorce from his wife, who had deserted him, and who held the legal title thereto, and she, after deliberating upon such offer, accepted it; that in December, 1890, her brother was divorced, and having, by exchanging other land, secured the title to the lots in question, he, at her request, conveyed the premises to her on March 28, 1893; and that she had faithfully cared for and nursed him until he died. At the time defendant appeared as plaintiff's wit-

ness, June 30, 1899, she was unable to state where the land was situated which her father conveyed to her brother; but thereafter, her son having found among Case's papers a letter from her father, the land was located in Andrew County, Missouri, and certified copies of the deed executed by her father November 1, 1866, to I. W. Case, conveying 132 acres, and reciting a consideration of \$2,500, and of a deed from the latter, executed February 25, 1867, to another brother, for the expressed consideration of \$2,750, conveying the same premises, and of the Tax Book of said county for 1865 and 1866, were procured and offered in evidence, showing that Nathaniel Case, defendant's father, was assessed with the land described in said deeds for those years. The defendant's son testified that in August, 1889, at Astoria, Oregon, he heard his uncle I. W. Case tell his mother that he had received to her use the sum of \$2,000 from his father.

The defendant's testimony is not contradicted in any manner, except that she says she never told her sons that her brother owed her \$2,000, saying: "I never told them anything about it. I didn't know anything about him, no more than I did a perfect stranger." Her son testified that in 1883 he first heard that his uncle owed his mother \$2,000, and in answer to the question, "Who told you at that time?" he answered, "My mother. She was visiting me in Nebraska in the fall of '83, and told me of the visit of her brother in Des Moines, Iowa, in '81, when he first told her he would pay her this sum." The defendant was seventy-two years old when she appeared as a witness, and, while this contradiction in her testimony is not very material, we think it quite probable that, in saying she had not told her sons of the money which her brother owed her, she meant to be understood that she did not inform them thereof in 1881, when she met her brother at Des Moines, Iowa. Her testimony is consistent, reasonable, and probable. Her father, being displeased with her husband, never made any donation to her until a short time before his death, when he sought to make some reparation for his neglect, and to place her on an equality with his other children, by pro-

viding a fund for her benefit. It was not then known where she was living, and not until fourteen years thereafter did her brother learn her residence. At that time she was living with her husband, who would have squandered the money had she received it; but, having been divorced, she came to the Pacific Coast, and, in pursuance of the agreement with her brother, kept house and cared for him. We believe she testifies truthfully, and that upon an accounting with her brother there was found to be due her, in principal and interest, the sum of \$5,000.

5. The relationship existing between Case and the defendant imposes upon her the burden of showing that she paid a valuable and adequate consideration for the property, and secured the conveyance thereof without knowledge or notice of any intention on his part to hinder, delay, or defraud his creditors: *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Flynn v. Baisley*, 35 Or. 268 (57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495); *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22, 59 Pac. 805); *Wright v. Craig*, 40 Or. 191 (66 Pac. 807). We think she has complied with this requirement, and established the fact that she paid the sum of \$5,000 on account of the purchase of the property. She cared for her brother nearly four years before she secured the deed from him, which she testified was executed at her request. She says that his malady required almost constant attention, and that her services were reasonably worth the sum of \$2,500. The defendant's testimony in this respect not being contradicted in any manner, we conclude that she paid \$7,500 for the property.

6. The consideration expressed in the deed is \$11,000, and the defendant, in speaking of the value of the property, said, "I think it was worth about \$11,000." It will be remembered that her agreement was to care for her brother while he lived, and hence a part of the consideration had not been performed when the deed was executed; but, if Case had sufficient property to pay his debts at that time, the deed would not be void: *Hapgood v. Fisher*, 34 Me. 407 (56 Am. Dec. 663). We believe that Case was solvent at the time he made the deed, and, the

defendant having paid a valuable consideration therefor, the inadequacy is not so great as to shock the conscience of a court of equity, or to render the deed invalid because a part of the consideration consisted in future care. The deed was not recorded for two months after it was executed, but the delay is explained by the fact that the defendant's son, to whom it was intrusted, went to the World's Fair, and forgot to have it recorded, and thereafter Case, at her request, filed it for record, two months before his bank suspended. Case lived with his sister after the deed was executed, but this ought not to defeat the conveyance; otherwise a debtor could not prefer his wife, when she is his creditor, by conveying to her his home, unless he contemplated deserting her.

Frank Patton, who was surety on Case's bond as treasurer of the Water Commission of Astoria, having seen a notice in the newspaper that Case had executed the deed in question, inquired of him what he meant by conveying away his property, and was informed that he had sold it for \$11,000 cash, and put the money into his business. This statement was not made in the defendant's presence, and hence she is not bound thereby. Besides, Case may have considered that he was indebted to his sister in that sum.

Having reached the conclusion that Case was solvent at the time he executed the deed to the defendant, and that she paid a valuable consideration therefor, it follows that the decree is reversed, and the complaint dismissed. REVERSED.

Argued 18 November; decided 16 December, 1901.

HAMMER v. DOWNING.

[66 Pac. 916.]

SUPPLEMENTARY PROCEEDING—ORDER—PRESUMPTION.

An order in supplementary proceedings requiring a defendant to apply certain money to the satisfaction of the judgment is not supported by a referee's finding that on a date more than three months prior to the reference he had such money in his possession, and that, no evidence to the contrary having been offered, he was therefore still in possession thereof; the presumption invoked to support the order being insufficient for that purpose.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Thomas J. Hammer against F. O. Downing and another, partners under the firm name of Downing, Hopkins & Co. Judgment for plaintiff. From an order, issued in supplementary proceedings, requiring the defendant Downing to apply certain money to the satisfaction of the judgment, defendants appeal.

REVERSED.

For appellants there was a brief over the name of *Woodward & Palmer*, with an oral argument by *Mr. John H. Woodward*.

For respondent there was a brief over the names of *Watson & Beekman, Coovert & Stapleton, Edw. Mendenhall, T. H. Ward, and Wilson T. Hume*, with an oral argument by *Mr. Edward B. Watson*.

MR. JUSTICE MOORE delivered the opinion.

This is a proceeding supplemental to an execution, to compel the satisfaction of a judgment. The plaintiff filed an affidavit, from which it appears that he secured a judgment against the defendants F. O. Downing and F. H. Hopkins, partners as Downing, Hopkins & Co., in the circuit court for Multnomah County, October 29, 1897, for the sum of \$7,817.50 and his costs and disbursements; that an execution was issued thereon November 24, 1897, and delivered to the sheriff of said county, who in pursuance thereof demanded from the defendant Hopkins payment of the sum stated therein, or information as to the defendants' property liable to be seized under the writ, which demand was refused; that the sheriff, after due and diligent search and inquiry, was unable to find any property belonging to either of them out of which he could make more than a small part of the sum so demanded. He further deposed, upon information and belief, that each of said defendants had money, stocks, notes, mortgages, and real estate liable to such execution, which he refused to apply toward its satisfaction, and greater in amount than was required for that purpose; stating the sources of his information, specifying the alleged property, estimating its value, and praying for an

order requiring each of the defendants to appear before the court or a referee, at a time and place to be appointed for that purpose, to answer under oath concerning his property not exempt from execution. Based upon said affidavit, the judge, at chambers, on December 4, 1897, made an order appointing J. R. Stoddard referee to take and report the testimony to the court, with his findings thereon, requiring each of the defendants to appear before the referee on December 20, 1897, at 10 o'clock A. M., and to attend before him until their examination was concluded, and directing that they should be personally served with said order and a copy of the affidavit. The sheriff served the same upon Downing, but certified that, after due and diligent search and inquiry, he was unable to find Hopkins within said county. Downing filed an affidavit December 18, 1897, controverting the statements contained in plaintiff's voluntary declaration under oath, and applied to the court for an order vacating the proceedings; but, the motion having been overruled, the time for his examination was changed to December 23, 1897, at the hour of 10 o'clock A. M., and the amended order personally served upon him. At the time so appointed he failed and neglected to appear before the referee, whereupon the latter took the testimony of the witnesses, from which he found, in effect, that on April 24, 1897, and thereafter to September 1st of that year, Downing was the owner of and had money in his possession in said county, liable to execution, in a sum not less than \$10,000; that between said dates he was also the owner and in the possession of other personal property in said county, liable to execution, of the value of not less than \$10,000; that, no evidence having been offered tending to prove that he had paid out any of said money or parted with the possession of any of said personal property, he was therefore still the owner and in the possession thereof; and that within ten days from the entry of an order to that effect he should be required to pay said sum of \$10,000 in money, or so much thereof as was necessary to satisfy plaintiff's judgment. The defendant's exception to the report of the referee having been overruled, the court on April 4, 1898, ordered Downing,

on or before the 16th of that month, to apply said sum of \$10,000, lawful money of the United States, in his possession, or so much thereof as was necessary, to the satisfaction of said judgment; and they appeal.

It is contended by defendant's counsel that the findings of fact are insufficient to support the final order. The examination before the referee was held December 23, 1897, and he found, from the testimony taken and incorporated in the bill of exceptions, that the defendant Downing, from April 24, 1897, to September 1st of that year, had in his possession, in Multnomah County, money liable to execution in a sum not less than \$10,000, and, no testimony having been offered tending to show that any of this sum had been paid out, he still had the same in his possession. The finding that Downing was still possessed of said sum of money is a conclusion of law, resulting from the application of the disputable presumption that a thing once proved to exist continues as long as is usual with things of that nature: Hill's Ann. Laws, § 776, subd. 33. The question thus presented is whether a sum of money usually continues in the possession of the same person for more than three months. Money, in addition to its intrinsic worth, is only valuable as a medium of exchange, just in proportion as it freely circulates. Misers hoard money; but this propensity is not the general characteristic of people engaged in active business, who expect to secure an increase of their capital by its use. The habit of secretly storing money does not prevail among persons who expect to secure interest by loaning it to others. In times of financial depression money is usually withdrawn from circulation; but such retirement results from the owner's fear of its loss. As soon as such apprehension is allayed, however, the money is restored to its field of former usefulness. No testimony was offered tending to show that from September 1, 1897, to December 23d of that year, the time appointed for the examination of the judgment debtor, a condition of monetary stagnation prevailed in Portland, Oregon, nor does it appear that Downing was a miser. In *Williams v. Harrison*, 19 Ala. 277, it was held that when money is shown to

have come to the hands of a guardian at a particular time, and there is no evidence whatever that any disposition has been made of it, it is the province of the jury to decide whether such possession continued until a particular time afterwards. Mr. Chief Justice DARGAN, in speaking of the certainty of the conclusion thus reached, observes: "I will not say that it would be improper to draw such an inference in the absence of all other proof; but to my mind it would be a very weak and inconclusive presumption." In that case the presumption of the continuance of things once proved to exist was invoked against a person whose duty it was to account for the money, which was proven to have once been in her possession. In the case at bar, however, Downing, before being cited to appear for examination, owed no duty to the plaintiff that required him to account for the money which he possessed prior thereto; so that the presumption relied upon is not applicable to the facts involved.

A better reason for concluding that the presumption relied upon to sustain the final order is insufficient for that purpose is based on the fact that, as the judgment debtor's failure to apply property found in his possession or under his control to the satisfaction of a judgment in proceedings supplemental to execution renders him liable to be punished as for a contempt of court (Hill's Ann. Laws, § 310), the proof of such possession ought to be conclusively established by the weight of the testimony given at such examination, and not deduced from disputable presumptions. The court having erred in making the final order, it must be set aside.

REVERSED.

Argued 2 July; decided 21 July, 1902.

ROBSON v. HAMILTON.

[69 Pac. 651.]

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FRAUDULENT CONVEYANCE—EVIDENCE.

1. A letter from a debtor to a creditor: "If you get in and sue me, it will take the whole place to pay the lawyers with, and you and I will have nothing. You can just do as you please. Either sue me, and be sure of getting nothing, or you can just wait on me, and I will get it when I can,"—and others of similar import, indicated that the execution of a deed twenty-one days later by the debtor of her realty was to put it beyond the reach of her creditors, and were admissible, in a suit to set aside the conveyance, to establish such fraudulent intent.

EVIDENCE OF FRAUDULENT INTENT—*RES GESTAE*.

2. In a suit to set aside a deed as in fraud of creditors, the grantor's declarations to the notary at the time the conveyance was executed as to intent were admissible as *res gestae*.

DEED TO RELATIVE—BURDEN OF PROOF AS TO GOOD FAITH.

3. Where a daughter conveyed realty to her parents to put it beyond the reach of creditors, the law presumes that they were aware of her fraudulent intent.

CONTRACT AGAINST PUBLIC POLICY.

4. Plaintiff conveyed her realty to defendant in order that she might take her husband and son out of the state to avoid their being prosecuted for a felony. Defendant deeded the same to her parents to put it beyond the reach of her creditors. Plaintiff thereafter sued on the notes given for the purchase price, and recovered judgment. *Held*, that plaintiff could have the conveyance made by defendant set aside, in order to enforce her judgment, as it was not necessary for her, in opening her case, to show that she had violated the law; nor did she need the aid of the original transaction to maintain her suit.

APPEAL—DISPOSITION OF EQUITY CASE ON REVERSAL.

5. Where, in an equitable suit, defendants did not introduce evidence because the court excluded competent evidence offered by plaintiff, the cause will be remanded, on appeal, instead of entering final judgment for plaintiff.

From Linn: REUBEN P. BOISE, Judge.

This is a suit by Elizabeth Robson against Juliett Hamilton and others to set aside a deed to real property, and to subject the premises to the satisfaction of a judgment. It is alleged in the complaint, in substance, that about October 1, 1894, the defendant Juliett Hamilton and one Michael Berrigan, to evidence a part of the purchase price of the real property herein-after described, executed to plaintiff their four promissory notes, of \$300 each, payable in one, two, three, and four years,

respectively, from said date, with interest at 5 per cent per annum; that the three latter not having been paid when due, or at all, she commenced an action in the circuit court for Linn County to recover thereon; that a tract of land consisting of the northwest quarter and the west half of the northeast quarter of section 5, in township 13 south of range 1 west of the Willamette Meridian, in said county, was duly attached therein, and, on October 23, 1900, a judgment was rendered in said action against Mrs. Hamilton for the sum demanded, and said premises were ordered sold, and an execution thereon was returned *nulla bona*; that on October 5, 1896, Mrs. Hamilton, being the owner of said land, which was then and now of the value of \$1,400, and of certain personal property of the value of \$400, and, being deeply indebted and unable to pay her creditors, for the purpose of hindering and delaying whom, and without any consideration therefor, executed to her mother, the defendant Mary M. Jones, a pretended deed of said premises, which has been duly recorded; that about that time Mrs. Jones advanced to her daughter Mrs. Hamilton the sum of \$400, which was afterwards repaid by the sale of personal property belonging to the latter; that Mrs. Jones and her husband, the defendant John H. Jones, have at all times known that the pretended transfer by Mrs. Hamilton rendered her insolvent, and that she made said deed to her mother, to hinder, delay, and defraud her creditors.

Mrs. Hamilton, answering separately, denied that the deed was made to hinder, delay, or defraud her creditors, and alleged that at the time she signed it her father and mother well knew of her indebtedness, and of her probable inability to pay the same; that said deed was made in pursuance of an agreement whereby her parents were to keep and educate her children, and to permit her to make her home with them whenever she so desired, in consideration of which they were to have the use of all that part of said land that should remain after conveying enough of it to plaintiff to pay the sum due her; that, in order more conveniently to carry out the terms of their agreement, she signed and acknowledged the deed to her

mother, and placed it in her trunk until she obtained security for the faithful performance of their contract, but without her knowledge or consent it was taken therefrom and placed on record.

The defendants Mary M. and John H. Jones, answering jointly, denied the material allegations of the complaint, and alleged that the plaintiff and their daughter had entered into a fraudulent agreement, in pursuance of which said judgment was rendered against her, with the understanding that she would not be required to pay any part thereof; that the deed was executed by Mrs. Hamilton to her mother in good faith and for a valuable consideration, and accepted by the latter without any knowledge or notice of Mrs. Hamilton's pre-existing indebtedness; that in May, 1896, Mrs. Hamilton executed to said defendants a note for the sum of \$1,000, secured by a mortgage on said land, the consideration for the note being the sum of \$400 in money advanced to her, and the settlement of a claim for the board and care of her children, and for the time employed and expense incurred in making a journey from Illinois to Oregon at Mrs. Hamilton's request, which board, care, expense, and time were reasonably worth the sum of \$600; that about June 18, 1896, Mrs. Hamilton delivered to said defendant thirteen head of cattle, worth \$10 each, the value of which was to be credited on her mortgage note, which could not then be found, but was afterwards discovered in her possession; that in consideration of the cancellation of said mortgage, and the receipt of a cow and a cook stove, and the settlement of said account, and for the future support of Mrs. Hamilton's children, she executed said deed, the consideration for which was paid without notice or knowledge of her pre-existing indebtedness; that since securing the deed, and without notice of any claim upon plaintiff's part, said defendants have made permanent improvements upon said land of the value of \$446; and that the real property at the time Mrs. Hamilton's deed was executed was of no greater value than \$500, and now worth not more than \$946.

The reply put in issue the allegations of new matter in the answer of Mr. and Mrs. Jones; and, at the trial which followed, the plaintiff's counsel introduced their testimony and rested, whereupon the court dismissed the suit, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *H. C. Watson*, and *Samuel M. Garland*, with an oral argument by *Mr. Watson*.

For respondent Jones there was a brief over the names of *W. M. Brown*, *Percy R. Kelly*, and *L. M. Curl*, with an oral argument by *Mr. Kelly*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The plaintiff's deposition offered in evidence is to the effect that in the summer of 1894 she was the owner of said land, upon which she was then living, and having a son held in the jail of Linn County, Oregon, awaiting examination upon a charge of larceny, the defendant Juliett Hamilton informed her that her husband and another son were liable to be sent to the penitentiary for crimes committed by them, and suggested that if she would convey said land to her, and leave the state with her husband and the latter son, and not return or permit her residence to become known to her friends in Oregon, the son who was in jail could attribute the theft with which he was charged to the brother who had gone away, and thus escape punishment; and, fearing that her husband and other son might be apprehended, she accepted the advice of Mrs. Hamilton, and in pursuance thereof executed to her a bill of sale of certain personal property, and a deed of said land, receiving therefor the promissory notes hereinbefore described and \$250 in cash, with which she went to California, leaving her son in jail, and taking her husband and the other son with her, and that she did not correspond with any of her relatives until about October, 1896. Certain letters written by Mrs. Hamil-

ton to plaintiff, and properly identified, were attached to the deposition and offered in evidence; but, having been excluded by the court, they were admitted as "evidence offered, excluded, and excepted to," under the rule prescribed therefor: Laws, 1893, p. 26. The plaintiff, having resided in California since 1894, was unable to state upon her examination whether Mrs. Jones had any knowledge of her daughter's indebtedness prior to accepting the deed from her. J. O. Wilson, appearing as plaintiff's witness, testified that Mrs. Hamilton, prior to securing the deed of the land, said to him, "If you don't give me away, I'll scare them out and get the place." W. C. Peterson, another witness, testified that, as a notary public, he prepared the deed, and took the acknowledgment of Mrs. Hamilton thereto, conveying the land in question to her mother, and that her father was present when the deed was executed. The witness was thereupon asked to state what was said by Mrs. Hamilton at that time, but, an objection having been sustained on the ground that her mother was not present, his answer was received, and marked as "evidence offered, excluded, and excepted to," and is as follows: "She came to my office and made a statement that she owed her father and mother for taking care of her children; that she was in a pressed condition, and wanted to turn the property over to them; that they had had some trouble,—as she put it, she wanted a 'breathing spell.' I reached up and took down a blank from my cases,—a mortgage blank. I presumed she wanted to give a mortgage. And she said, 'No; I want to make a deed, and stop this trouble.'" Before Mrs. Jones can be charged with any participation in the alleged fraud of her daughter, it must appear that Mrs. Hamilton intended, by executing the deed, to place the property beyond the reach of her creditors, with intent to hinder, delay, or defraud them. Her letters to plaintiff tend to show such intention, for in one of them, written twenty-one days before the deed was executed, she says: "I will get you your money if I can. You can fuss at me as much as you please, but you can have no effect on me, as I am a woman of my word. If you get in and sue me, it will take the whole place

to pay the lawyers with, and you and I will have nothing. You can just do as you please. Either sue me, and be sure of getting nothing, or you can just wait on me, and I will get it when I can." This letter, and others of similar import, having tended to disclose Mrs. Hamilton's purpose in executing the deed to her mother, were admissible in evidence to establish her fraudulent intent, as a foundation upon which Mrs. Jones' knowledge thereof, if it existed, must have rested; and the court erred in not permitting them to be given in evidence.

2. Mrs. Hamilton's declarations to the notary in her father's presence, made at the time the conveyance was executed, were in respect to the subject-matter, and, as such, constituted part of the *res gestae*, and were admissible in evidence: Wait, Fraud. Conv. (3 ed.) § 276. Thus, as was said by Mr. Chief Justice SHERWOOD in *Snyder v. Free*, 114 Mo. 360 (21 S. W. 847): "And the declarations made by Mrs. Wing to the notary were evidence, because part of the *res gestae*, and were evidence to show the intent of the grantor in executing the deed, as against her and all persons claiming under her; and those thus claiming property must take it subject to the infirmity attached to it by the conduct of the grantor."

3. Mrs. Hamilton's answer avers that she was to have a home with her parents on the land which was conveyed to her mother whenever she so desired, and this allegation is not denied by her codefendants. Whether she availed herself of this provision of their agreement, and resided with them any part of the time, is not disclosed by the testimony; but that fact is unimportant, for, as she is their daughter, the law presumes that they were aware of her fraudulent intent, to rebut which the burden was imposed upon them to show that Mrs. Jones was an innocent purchaser for a valuable consideration, and without knowledge or notice of any intent by her daughter to hinder, delay, or defraud her creditors: *Marks v. Crow*, 14 Or. 382 (13 Pac. 55); *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Feldman v. Nicolai*, 28 Or. 34 (40 Pac. 1010); *Flynn v. Baisley*, 35 Or. 268 (57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep.

495); *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22, 59 Pac. 805).

4. Defendants offered no testimony to rebut the presumption which the law invokes when real property is conveyed by one intimate relative to another, the *bona fides* of which is attacked by creditors alleged to have been defrauded thereby; and the decree should be reversed unless plaintiff's judgment, which forms the basis of this suit, violates the rules of public policy, as being *contra bonos mores*. "Public policy," says Mr. Justice MAGRUDER in *People v. Chicago Gas Trust Co.* 130 Ill. 268 (22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319), "is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." A court of equity will not lend its aid to enforce a contract growing immediately out of, or necessarily connected with, an illegal or immoral act: *Buchtel v. Evans*, 21 Or. 309 (28 Pac. 67); *Ah Doon v. Smith*, 25 Or. 89 (34 Pac. 1093); *Bradtfeldt v. Cooke*, 27 Or. 194 (40 Pac. 1, 50 Am. St. Rep. 701); *Müller v. Hirschberg*, 27 Or. 522 (40 Pac. 506); *Pacific Live Stock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597); *Oscanyan v. Arms Co.* 103 U. S. 261. Thus, where a party purchases land of another at a price greatly less than its value, if not for the purpose of taking advantage of the vendor, at least for the purpose of enabling him to go out of the state and avoid a prosecution for feigny, a court of equity will not lend its aid to enforce a contract made under such circumstances: *Dodson v. Swan*, 2 W. Va. 511 (98 Am. Dec. 787). The test of a violation of the rules of public policy is whether the plaintiff requires the aid of the illegal transaction to establish his right; for, if he cannot open his case without showing that he has transgressed the law, a court will not assist him: *Morris' Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173 (8 Am. Rep. 159); *Nester v. Continental Brewing Co.* 161 Pa. 473 (29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894). "If a plaintiff," says Mr. Justice DUNCAN in *Swan v. Scott*, 11 Serg. & R. 155, "cannot open his case without showing that he has broken the law, a court will not assist him,

whatever his claims, in justice, may be upon the defendant; and, if the illegality be *malum prohibitum* only, the plaintiff may recover, unless it be directly on the forbidden contract,—a bond, the consideration of which grows out of an illegal transaction. There the illegal consideration is the sole basis of the bond, and there can be no recovery. But if a judgment has been rendered on that bond, and another bond is given in satisfaction of it, there the judgment, which must be legal, is the consideration, and the obligor is precluded from entering into the legality of the original transaction.” In the case at bar the suit is not upon the original contract, but upon the judgment which forms the foundation for, and is the basis of, the relief demanded. Mrs. Hamilton agreed to pay a valuable and an adequate consideration for the land and personal property which she secured from the plaintiff, but, having failed to pay three of the promissory notes, evidencing a part of the purchase price, judgment was rendered thereon for the sum due. It was not necessary, therefore, for the plaintiff, in opening her case, to show that she had violated the law, nor did she require the aid of the original transaction to establish her case; and hence the decree must be reversed.

5. Suits in equity are tried anew on appeal, and a final decree is usually rendered in this court, and a cause should not be remanded to the lower court for further consideration unless necessity demands it. It was incumbent upon the defendants to present their testimony when they had an opportunity, but their failure to do so was evidently induced by a reliance upon the court's excluding competent evidence, to the introduction of which their objections were sustained; and, assuming this to be so, the cause will be remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion.

REVERSED.

Argued 17 March; decided 7 April, 1902; rehearing denied.

LADD v. HAWKES.

[68 Pac. 422.]

ACTION FOR RENT—EVIDENCE.

1. Defendant, in an action for rent of a wharf, having alleged he agreed to pay for it only so long as he occupied it, may give evidence not only that he was not in the occupancy of it, but that another was, through agreement with plaintiff.

EFFECT OF ADMISSIONS.

2. A statement of defendant, who alleged he was to pay rent for a wharf only so long as he occupied and used it, that the lease was for an indefinite time, and that he did not surrender possession, is not an admission that he was to pay rent, without regard to use and occupancy.

SELF-SERVING DECLARATIONS.

3. A statement by defendant to plaintiff that he had quit business, and did not want the wharf any longer, is not a self-serving declaration; he alleging that, by the terms of the letting, he was to pay rent only so long as he occupied and used the wharf.

RENT—MEASURE OF VALUE OF REPAIRS.

4. The value of repairs in lease of a wharf, providing the lessor shall pay the lessee the value of repairs if he is not allowed to remove them, is their value as contained in the wharf, and not what the material, if taken out, would sell for.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by William M. Ladd against John F. Hawkes. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Francis D. Chamberlain*.

For respondent there was a brief and oral argument by *Mr. John Ditchburn*.

MR. JUSTICE WOLVERTON delivered the opinion.

The plaintiff, as trustee of A. H. and Cordelia Johnson, brought this action to recover rents under an alleged lease. The complaint avers that in May, 1898, the plaintiff let to the defendant a wharf on blocks 1 and 2 in East Portland, at a monthly rental of \$20; that defendant entered into possession thereof, and has since continued to occupy it as tenant; that

the rent has been paid to May 31, 1900, only,—and prays judgment for seven months' rental, from June 1 to December 31, 1900, amounting to \$140. The defendant denies the leasing and occupancy, except as stated in his answer. For a separate defense, and by way of counterclaim, he alleges that during the year 1894 he entered into an agreement with Cordelia Johnson whereby it was understood and agreed that he should pay her \$10 per month as long as he occupied and used the wharf situated on block 2 in East Portland, but that he should not be required to pay anything for or during the time that he did not occupy or use the same; that thereafter, in the year 1898, he and one Swan, who was the agent for the property, entered into an agreement whereby he was to take charge of and occupy the wharf on block 1, and pay \$10 per month while in the occupancy and use thereof; that he was to repair and improve said wharf so that he could utilize the same, and that when he should cease to occupy or use it he should have the privilege of removing said "repairs and fixtures," or the owner should pay him the value thereof; that he has not occupied or used said wharves, or either of them, since the 11th day of June, 1900; that he used lumber of the value of \$75, expended for labor \$50, and for nails \$15, aggregating \$141, in making such repairs and improvements, for which sum he prays judgment against plaintiff. The reply simply denies the allegations of the answer. A trial was had before a jury, and defendant having obtained a verdict and judgment for \$1, plaintiff appeals.

At the trial defendant was permitted to testify, over objections, that he told Elliott, plaintiff's agent, that he desired a settlement with him; that he had quit the business, and wanted to sell to him, or to the man who had rented the wharf, what lumber he had; that he notified Elliott he did not want the wharf any more, and wanted pay for his plank, or to take them away; that at another time he went with a man by the name of Smith to Elliott to rent the wharf, and was told that the box factory had it; and that he went with Smith to the box factory. Charles C. Woodcock, manager of the Standard

Box Factory, also testified that he spoke to plaintiff's agent about renting the wharf; that the agent told him that he could have it if Hawkes gave it up; that he went to see Hawkes, who said he was going to give it up; that he (witness) told another man, who wanted to put in a wood yard, that he could have it; and he told Elliott that he would take the wharf, but did not take possession of or occupy it. This, with other evidence, was offered, as stated by the defendant's counsel, to show that plaintiff, through Elliott, rented the wharf to the box factory along in July,—about the time it is alleged by the answer that defendant ceased to occupy or to use the same. The plaintiff assigns error on account of the admission of this testimony, on two grounds: (1) Because the defendant has not pleaded a termination of the lease; and (2) that the testimony consists in part of self-serving acts and declarations on the part of the defendant. It should be noted in this connection that defendant offered, and there were received in evidence, certain receipts given by plaintiff to defendant during the year 1898, subsequent to May 1st, acknowledging payments of rentals on account of the wharf at \$10 per month; also that, when opening the case to the jury, counsel for defendant was interrogated by one of the jurors as follows: "Q. Mr. Ditchburn, was the lease with the plaintiff for an indefinite time? A. Yes. Q. Did you ever surrender the possession of the premises to the plaintiff? A. No." In this connection the counsel further stated to the jury that he contended there was no other agreement than the one stated in the defendant's answer.

1. It is insisted that these receipts show unmistakably a leasing, and that counsel's statements to the jury admitted it; that, a leasing having been established, it was necessary, in order to show a termination thereof, to plead the fact, as otherwise testimony could not be admitted to prove it. The defendant's contention is that he agreed to pay rent only for the time he was in the use and occupancy of the wharf, and his answer, we think, fairly presents this contention, so that when he ceased to use or occupy it his liability to pay rent ceased.

It is alleged that he did so cease to use or occupy the premises about June 11, 1900, and the evidence complained of tends to show that he was not only not in the occupancy of the wharf, but that another was, and that through the direction and agreement of plaintiff. It was therefore manifestly pertinent for the consideration of the jury.

2. The plaintiff proceeded upon one theory, and the defendant upon another, and each was entitled to support his contention by evidence, and defendant's evidence was competent and relevant for his purpose. Counsel's statements to the jury were susceptible of a construction in harmony with his contention, and did not commit the defendant to the position insisted upon by plaintiff.

3. Nor can what the defendant told Elliott about having quit the wood business, and not wanting the wharves any longer, nor what he and Smith did, be characterized as self-serving acts and declarations. They were incidents that transpired in the course of negotiations between the parties relative to the occupancy of the wharves, and were proper for consideration in connection with all the circumstances connected therewith.

The witness Woodcock testified, over objections, that they (referring to the box factory) had logs lying in front of the wharves, and paid plaintiff for the privilege. This was subsequent to the alleged arrangement had by the box factory with the bank. Prior to that time he paid Hawkes for the privilege. Objection is urged to this testimony on the ground that defendant had not pleaded that his use of the wharf has been interfered with; but it was admissible and relevant, as tending to show that defendant had ceased to use, and was not at that time in the occupancy of, the wharf.

Some instructions were asked and refused, intended to present the same questions as here discussed, and error is assigned in this relation; but what has been said renders it unnecessary to consider them.

4. Another instruction was asked relative to the amount defendant was entitled to recover on account of the repairs and

improvements made, basing it upon the present market value of the materials used after their removal. The answer alleged, in effect, that plaintiff agreed to pay defendant the value of the repairs if he was not permitted to remove them. This means their value as contained in the wharf, and not as secondhand material. So it is apparent that the instruction was unsound, as applied to the facts under the pleadings. This disposes of all the errors assigned, and, being favorable to respondent, the judgment of the trial court will be affirmed.

AFFIRMED.

Argued 31 July; decided 25 August, 1902.

BEERS v. AYLSWORTH.

[69 Pac. 1025.]

FRAUDULENT TRANSFER—STATEMENTS OF GRANTOR.

1. In a garnishment proceeding, it being claimed that the transfer of property by the debtor to the garnishee was fraudulent, statements of the debtor concerning the transfer, made a few days before it, are admissible to show the debtor's intent, though not binding on the garnishee, having been made in his absence, unless he had knowledge of them.

TRIAL—OBJECTION—STATEMENT OF EXPECTED ANSWER.

2. Statement of counsel on the refusal of the court to allow witness to testify to conversation with H, who made a transfer of property to A, claimed to be fraudulent: "I wish to show that H made certain declarations * * concerning the assignment * * a few days prior to the transfer to A. In this proceeding we are obliged to show the fraudulency of the transaction, and one of the principal things we must prove is that H transferred this stock with fraudulent intent,"—sufficiently shows what was expected to be proved by the answer to allow a review of the ruling.

FRAUDULENT CONVEYANCES—EVIDENCE OF CONSIDERATION.

3. Where the consideration for a conveyance is being inquired into, a wide latitude should be allowed in the examination of witnesses, for the purpose of determining the amount and value of the consideration alleged to have been paid, and, ordinarily, a mere statement of the debtor that he owed a certain sum will not be conclusive.

From Multnomah: **ARTHUR L. FRAZER, Judge.**

Supplemental proceeding by Lusetta P. Beers against C. A. Aylsworth, resulting in an adverse judgment, from which plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Waldemar Seton* and *Claude Strahan*, with an oral argument by *Mr. Strahan*.

For respondent there was a brief and an oral argument by *Mr. Henry H. Northup*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a proceeding to determine the liability of a garnishee. The transcript shows that the plaintiff, *Lusetta P. Beers*, having secured a judgment against one *Robert Hanlin* for the sum of \$635.80, an execution was issued thereon, in pursuance of which a notice of garnishment was served upon *C. A. Aylsworth*, who, complying therewith, made a certificate to the effect that he did not have in his possession or under his control any debts, dues, moneys, rights, credits, or property belonging to *Hanlin*. This certificate being unsatisfactory to plaintiff, she filed written interrogatories and an affidavit in the nature of a complaint, averring that on September 2, 1899, *Hanlin* was the owner of 50 shares of stock in the *Larch Mountain Investment Co.*, a corporation, on which day, and while her action against him was pending, without any consideration therefor, and with intent to hinder, delay, and defraud her, he made a pretended sale of his stock to one *W. C. Aylsworth*, who agreed to sell it for and to turn the proceeds thereof over to him, of which facts the garnishee at that time had knowledge; that on February 24, 1900, the day on which said notice was served, the garnishee, acting as the agent of *Hanlin* and *W. C. Aylsworth*, sold said stock, receiving therefor the sum of \$500, which he held in trust for his principals; and that *Hanlin* is insolvent. The garnishee, having answered the written interrogatories and denied the material averments of the affidavit, alleged, as a separate defense, that, having paid the sum of \$300, which was a valuable consideration, *Hanlin* assigned the stock to *W. C. Aylsworth*, garnishee's son, in trust for him; that on February 24, 1900, he caused said stock to be sold, receiving therefor, in excess of expenses,

\$44, which sum he had in his possession; and that neither Hanlin nor W. C. Aylsworth had any interest in said stock after September 2, 1899. The allegations of new matter in the answer having been put in issue by the reply, a trial was had resulting in a judgment for the garnishee, and plaintiff appeals.

1. It is contended by plaintiff's counsel that the court erred in refusing to permit B. F. Johnson to testify concerning a conversation he had with Hanlin prior to the assignment of his stock to W. C. Aylsworth. This witness, in answer to the question, "Did you ever have any conversation with Robert Hanlin, concerning the transfer of this stock, prior to September 2, 1899?" replied, "I did." He was then requested to state the conversation. An objection having been interposed on the ground that such declaration was not made in the presence of the garnishee, plaintiff's counsel stated to the court: "I wish to show that Mr. Hanlin made certain declarations and admissions, concerning the assignment of this stock, a few days prior to the transfer to Mr. Aylsworth. In this proceeding we are obliged to show the fraudulency of the transaction, and one of the principal things we must prove is that Mr. Hanlin transferred this stock with fraudulent intent. It is held by an overwhelming list of authorities that the evidence is competent for that purpose, to show the intent of the grantor. It is not sufficient to bind the grantee." The witness not having been permitted to detail Hanlin's alleged declaration as thus announced, an exception was saved. To render the statement sought to be proved admissible, it should have related to the subject-matter, and been so nearly contemporaneous with, but prior to, the transaction as to render the expression a part of the *res gestae*: *Robson v. Hamilton*, 41 Or. — (69 Pac. 651). The stock was assigned September 2, 1899, and the question asked the witness was whether he had ever had any conversation with Hanlin upon that subject prior to that time. Plaintiff's action against Hanlin was instituted March 23, 1899, but when its cause arose we are unable to determine from an examination of the transcript. Any

declaration made by him concerning his stock prior to the time the said cause of action arose is immaterial. It will be observed that the question asked the witness does not connect the declaration sought to be imputed to Hanlin with his transfer of the stock, so as to make it part of the *res gestae*, but the statement of plaintiff's counsel limiting the expression to "a few days prior to the transfer to Mr. Aylsworth" would probably show that the transfer and the alleged declaration were sufficiently related to render them parts of the same transaction.

2. In *Kelley v. Highfield*, 15 Or. 277 (14 Pac. 744) it was held that, to render the action of the court in excluding testimony available, counsel should state what fact was expected to be elicited by an answer to the question. Counsel's announcement of what he expected to prove by an answer to the question is not very definite, but from the statement of the legal proposition, which is made a part of the bill of exceptions, the fact sought to be established is reasonably inferable, and sufficient, in our opinion, to present the question sought to be reviewed. It has been held, in suits instituted to set aside fraudulent conveyances, that evidence of the declarations of the vendor, made before the sale, and in the absence of the vendee, are admissible to show the fraudulent intent of the vendor, but they are not binding upon the vendee, unless it is proved that he had knowledge thereof: *Foster v. Hall*, 12 Pick. 89 (22 Am. Dec. 400); *Carver v. Barker*, 73 Hun, 416 (26 N. Y. Supp. 916); *O'Hare v. Duckworth*, 4 Wash. St. 470 (30 Pac. 724). Although the question propounded to the witness was not framed with much care, nor the statement of the testimony reasonably expected from him detailed with particularity, we nevertheless think he should have been permitted to answer the question, and that the court erred in rejecting such offer.

3. At the trial, W. C. Aylsworth, appearing as his father's witness, testified that he was conducting a store at Latourelle Falls, Oregon, for him; that whenever Hanlin wanted money he was authorized to take it from the store, and that he had

received therefrom about \$350; that he derived his knowledge from an examination of the check and account books, which evidenced the receipt of \$50 and \$40, respectively, and from Hanlin's telling him he had taken the remainder. On cross-examination he was asked, "You do not know of your own knowledge where any of the money came from, except that you saw this check for \$50 and this charge of \$40 in the books?" The court, upon its own motion, interrupting plaintiff's counsel, said to him, in the presence of the jury: "It seems to me, Mr. Seton, that it is not very important whether he does or not. It won't throw any light on the case one way or the other. If Mr. Hanlin admitted that he took that money, and wanted to transfer this stock in payment of it, Mr. Aylsworth would not be required to investigate further to find out whether Hanlin was telling the truth in admitting that he got \$350, accepting this statement of the witness as true. If a man is indebted to you, Mr. Seton, and you do not know just how much, you would be justified in taking his statement that he owed you a certain amount; at least that much you might be justified in believing he owed you, if he admitted it, especially if you see evidence of a considerable part of it. I think you have pursued this examination far enough. He would not be required, after Hanlin admitted he owed this money, and wanted to settle for it by transferring this stock, to say he saw Hanlin take this money. The examination has gone far enough on that point." An exception having been taken, it is contended by plaintiff's counsel that the court erred in its ruling. The issue to be tried was whether Hanlin sold his stock for a valuable consideration. The sum which he actually received was therefore material, as tending to establish the *bona fides* of the transaction. If the rights of his creditors had not been involved, he could probably have made such disposition of his property as would have pleased his fancy, but, the pleadings having admitted that he was insolvent, the plaintiff had a right to know where and how the sum of \$350 was paid to him. Hanlin's admission, to the effect that, availing himself of the privilege granted by the

garnishee, he had taken from the latter's store, in addition to the check and the sum charged to his account on the books, the sum of \$260, in payment of which he desired to transfer his stock in the corporation,—such declaration, whether true or false, would undoubtedly have been sufficient to warrant the garnishee in accepting the stock, as intimated by the court, unless the rights of his creditors were thereby prejudiced. If Hanlin's admission that he had taken the sum of money which he stated that he had received be sufficient evidence of the consideration for the stock, it would necessarily follow that every conveyance or transfer of property challenged for fraud could be upheld if the vendor were willing to admit that he had received an equivalent of the property in money or goods, taken by him in pursuance of the purchaser's license, but without his knowledge, though such admission was not fortified by the sanctity of a judicial oath or strengthened by a formal affidavit.

We do not wish to be understood as questioning the power of the court to limit the cross-examination of a witness, which is a matter largely within its own discretion, that will not be reviewed on appeal, except for a manifest abuse thereof; but where, as in this instance, the court, in the presence of the jury, announces a rule that is not justified by law, the judgment which followed, probably in consequence thereof, must be reversed, and it is so ordered.

REVERSED.

Argued 19 March; decided 14 April, 1902.

SPENCER v. PETERSON.

[68 Pac. 519, 1108.]

41	257
42	333
42	606
42	616

PLATS—DEDICATION OF ROADS SHOWN THEREON.

1. An owner who executes and records a plat of certain land showing thereon lots or tracts divided by or adjoining streets or roads, and sells property with reference to such plat, must be considered as having established and dedicated such roads to public use, regardless of an actual use by the public at large: *Hogue v. City of Albina*, 20 Or. 182, cited.

EFFECT OF NOT IMPROVING DEDICATED ROADS.

2. Failure of a county or municipality to open or work roads laid out on a plat of land does not defeat the right of the public therein, unless barred by adverse user.

PLAT—EVIDENCE OF INTENTION OF DEDICATOR.

3. A member of a real estate firm engaged as selling agents of the proprietors of land, who have made a plat thereof, on which are roads, may testify as to the proprietors' intention to dedicate the roads, as he must have known their intention in this respect.

QUANTUM OF PROOF IN CIVIL ACTIONS.

4. In civil actions, as, a case in which the jury must determine whether a road has been dedicated, only a preponderance of the evidence is necessary to a verdict.

COSTS—SHERIFF'S MILEAGE.

5. Under Laws, 1899, p. 66, requiring the sheriff to collect in advance his fees in a civil case, and to pay them to the county treasurer, and providing that the judgment shall include, as costs, the amounts so paid by the prevailing party to the sheriff, there is no error in approving taxation of costs taxing the sheriff's fees to defendant, against whom judgment was rendered; no question being raised whether the fees were paid to the county treasurer or retained by the sheriff.

COSTS—STATING MATERIALITY OF TESTIMONY OF WITNESS.

6. An amended verified statement as to costs, filed under Section 557 of Hill's Ann. Laws, as amended by Laws, 1891, p. 114, need not state that the testimony of a witness was material, it is sufficient to show that he attended the trial as a witness at the party's request and testified; having been heard, it will be presumed that he was a material witness: *Willis v. Lance*, 28 Or. 371, followed.

WITNESSES' FEES—OBJECTION—AMENDED VERIFIED CLAIM.

7. Where objection is made to a claim for the fees of a witness who has voluntarily attended the trial from a distance of more than twenty miles, the claimant must file an amended verified statement showing the facts as to the materiality of the testimony, the necessity for an oral examination, the fact of voluntary attendance, and the distance traveled.

SUFFICIENCY OF OBJECTION TO WITNESSES' FEES.

8. Objections to items of costs, under Section 556 of Hill's Ann. Laws, should be certain enough to inform the claimant in what particulars the specification is wrong. — 17.

nied items are not authorized or are unreasonable. For example, an objection to the taxation of mileage for a witness because he voluntarily attended from outside the county without an order of the court does not raise the question that the oral examination of such witness was unnecessary, nor require the prevailing party to make affidavit of such fact, though such affidavit would be necessary, under section 795, to obtain an order for his attendance.

From Marion: GEORGE H. BURNETT, Judge.

Action for damages by S. Spencer against V. C. Peterson.
Plaintiff having recovered a judgment, defendant appealed.
AFFIRMED.

For appellant there was a brief and an oral argument by
Mr. B. F. Bonham and *Mr. Carey F. Martin*.

For respondent there was a brief and an oral argument by
Mr. John A. Carson and *Mr. P. H. D'Arcy*.

MR. JUSTICE MOORE, delivered the opinion.

This is an action to recover damages for obstructing an alleged highway. Plaintiff avers that he is, and ever since May 6, 1891, has been, the owner and in possession of certain real property, from which he has been accustomed to pass with vehicles and on foot along a duly dedicated highway to the county road; that such highway is the only accessible route to and from his premises; and that defendant wrongfully obstructed the same by placing a fence across it, to his damage in the sum of \$1,500. The answer having denied the material allegations of the complaint, a trial was had, resulting in a verdict and judgment for the plaintiff in the sum of \$100, and defendant appeals.

1. It is contended by defendant's counsel that the court erred in admitting in evidence, over their objection and exception, a certified copy of the recorded plat of Waldo Hills Fruit Farm, No. 3, on the ground that it appears from an inspection thereof that the road which is claimed was obstructed was never a public highway. The plat in question has appended thereto a written instrument, denominated a

"dedication," executed as a deed of real property, by W. A. and John A. Shaw and their wives, reciting that they, being the owners of certain real property, and desirous of disposing of it in small tracts, and "to assure the purchasers thereof the permanent enjoyment of the roads shown on the annexed plat, which are on the said lands, have caused the said lands to be platted and subdivided in accordance with the annexed plat, which is hereby declared to be a true plat thereof." An examination of the plat shows that the real property delineated thereon purports to have been subdivided into 26 lots, varying in area from 10 to 78 acres, and that near the east border, extending north and south, appear parallel lines, marked, "Road, 50 ft.," separating lots 1, 2, and 3, from 4, 5, and 6. It is argued that the plat and the instrument so attached show that the roads thus indicated were not intended by the proprietors to be dedicated to the public generally but were designed for the use of the purchasers of the lots, only, and that they are private, and not public, highways. It will be observed that the "dedication" does not in express terms grant an easement in the roads, but, the instrument having been acknowledged and entered in the records of Marion County, we think the proprietors intended thereby to dedicate them to the use of the public; for the rule is well settled that when an owner of real property lays out a town upon it, and divides the land into lots and blocks, with streets and alleys between, and sells any of the lots reference to such plan, he thereby irrevocably dedicates the streets and alleys to the use of the public: *Carter v. City of Portland*, 4 Or. 339; *Meier v. Portland Cable Ry. Co.* 16 Or. 500 (19 Pac. 610, 1 L. R. A. 856*); *Hicklin v. McClear*, 18 Or. 126 (22 Pac. 1057); *Steel* 856); *Hicklin v. McClear*, 18 Or. 126 (22 Pac. 1057); *Steel v. City of Portland*, 23 Or. 176 (31 Pac. 479); *Hogue v. City of Albina*, 20 Or. 182 (25 Pac. 386, 10 L. R. A. 673). The rule in respect to the dedication of streets and alleys in a town must, upon principle, also apply to roads laid out on land in

*NOTE. Dedication of Land to Street Uses by Laying Out and Platting.

the country, which has been divided into small tracts to effect the sale thereof; and when the proprietors execute and acknowledge a map of the survey of such land, and cause it to be recorded, on which roads are noted, and sell any of such tracts with reference to the plat, the dedication of the roads is thereby established, without an acceptance or user by the public (*Point Pleasant Land Co. v. Cranmer*, 40 N. J. Eq. 81), and such dedication will be presumed to be in favor of the whole public, unless the presumption be overcome by the party denying the extent of the grant [Ang. & D. Highw. (3 ed.) § 141]; and hence no error was committed in admitting the plat in evidence.

2. Defendant's counsel, on cross-examination of plaintiff, in referring to the road alleged to have been obstructed, asked the following question, to which an objection was sustained on the ground that it was immaterial: "Has the county or any municipal authority undertaken to open or work that road?" An exception was saved, and the action of the court assigned as error. If the land so divided into tracts had been in a city, and laid out into lots and blocks, with intervening streets and alleys, duly dedicated, the failure of the municipal corporation to improve such streets would not defeat the right of the public therein, unless barred by adverse user. The roads laid out on the land in question, and noted on the plat, must be subject to the same rule; for if the converse were true, and a county was obliged to open a road when donated by a proprietor, he could have a highway on any line he might select. No error was committed in sustaining the objection.

3. W. H. Downing, plaintiff's witness, was asked the following question with reference to the purpose of the proprietors in respect to the roads noted on the plat: "What was the intention as to the dedication?" To which he was allowed, over defendant's objection and exception to answer: "The intention was to make it a public highway." It is maintained that the witness was not competent to express the intention of others, but we think the argument is without merit, for the testimony shows that the witness was at the time a partner of

W. A. Shaw, one of the proprietors, in the business of selling land, and, as such, was the agent for the proprietors, and must have known the intention of his principals in respect to the dedication of the roads.

4. The court instructed the jury, in effect, that it was incumbent upon the plaintiff to show a dedication of the highway by a preponderance of the evidence, but that, the action being civil, he was not required to establish such fact beyond a reasonable doubt. An exception to this portion of the charge having been reserved, it is insisted by defendant's counsel that more than a preponderance of evidence was required, and that the court erred in giving this instruction. When a person is to be deprived of his real property for the use or benefit of the public, and the alleged grant or dedication is not evidenced by condemnation proceedings or some conveyance, but is sought to be established *in pais*, the proof of the intention of divestiture ought to be clear and conclusive: 2 Dillon, Mun. Corp. (4 ed.) § 636; 2 Hermann, Estoppel, § 1142; *City of Eureka v. Croghan*, 81 Cal. 524 (22 Pac. 693); *State v. Adkins*, 42 Kan. 203 (21 Pac. 1069). We think the rule in all civil cases requires no more than a preponderance of evidence to establish any controverted fact, and hence no error was committed in giving such instruction.

Other errors were assigned, but we think them comparatively unimportant.

5. The plaintiff having filed a cost bill, the defendant objected to the following items thereof: "To sheriff's fees, \$3.00," on the ground that such disbursement is not allowed by law; and to "Witness fees of W. A. Shaw, one day and 106 miles, \$12.60," on the ground that he was not a resident of Marion County, Oregon, and attended the trial without the order of the court. The plaintiff filed an amended verified statement controverting such objections, and showing that said witness traveled from Portland to Salem and return, a distance of 106 miles, and was in attendance one day as witness, only, and was duly sworn and examined, whereupon the county clerk taxed the items as claimed. The court, upon

defendant's motion to retax the costs, approved the charges, and the defendant assigns such action as error. The court found that the sheriff necessarily traveled 30 miles in serving the summons in this action, and that he was entitled to collect \$3 therefor. Defendant's counsel contend that, although a statute regulating the salary of the Sheriff of Marion County provides for the payment of an additional sum for serving process in civil actions, such fees are not embraced in the title of the act, nor properly connected therewith, and that the court erred in assessing any sum for such service. A consideration of the point insisted upon is not deemed essential, for there is another statute concerning such fees, as follows: "The sheriffs of the several counties of Oregon shall be required to collect in advance the following fees in all civil cases, and to pay the same over to the several county treasurers at the end of every month, with an itemized statement showing the cases from which such fees were collected. The court shall include in its judgment against the losing party, as costs in the case, the amounts so paid by the prevailing party to the sheriff: For each mile necessarily traveled in serving any civil process or subpoena, ten cents; provided that no charge shall be made for constructive mileage in any case": Laws, 1899, p. 66. Judgment having been rendered against the defendant, the sheriff's fees were properly taxed against him; and, no question having been made as to whether such fees were paid to the county treasurer, or retained by the sheriff, no error was committed in approving the taxation of the costs.

6. The amended verified statement* shows that W. A. Shaw attended the court as a witness only at plaintiff's request, and, having given testimony at the trial, it must be presumed to have been material, and hence no error was committed in allowing the fees demanded: *Crawford v. Abraham*, 2 Or. 163; *Willis v. Lance*, 28 Or. 371 (43 Pac. 384, 487).

It follows that the judgment is affirmed.

AFFIRMED.

*NOTE.—See Section 557 of Hill's Ann. Laws. as amended by Laws, 1891, p. 114.—REPORTER.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion.

It is contended by defendant's counsel in their petition for a rehearing that this court erred in approving the allowance of the court below of plaintiff's claim of \$12.60 for disbursements to one of his witnesses. The plaintiff, having secured a judgment in the lower court, filed a cost bill containing, *inter alia*, the following item: "To witness fees and mileage of W. A. Shaw, one day, and 106 miles, \$12.60,"—to which the following exception was made: "Defendant objects to the allowance of \$12.60, or any part thereof greater than \$2.20, claimed by plaintiff as witness fees for W. A. Shaw for one day's attendance and 106 miles travel, for the reason that said witness is not a resident of Marion County, Oregon, and attended said trial voluntarily, and no order of court was obtained requiring the attendance of such witness." An amended verified statement was thereupon filed, showing that Shaw was a necessary witness; that at plaintiff's request he traveled from Portland to Salem, a distance of 53 miles, as a witness only, and for no other purpose; and that he was in attendance at the trial one day, for which he was entitled to \$10.60 mileage and \$2 witness fees, and detailing wherein his testimony was material. The clerk of the circuit court having allowed said items, defendant filed a motion to retax the disbursements, whereupon said court made the following finding: "The witness W. A. Shaw having attended court at the request of the plaintiff as a witness only, an order of the court to compel his attendance was unnecessary; and the claim of the plaintiff not being for double fees, the objection of the defendant to the amount charged in plaintiff's amended verified statement of the fees and mileage of said witness was not sufficient in point of law to challenge the correctness thereof;" and the motion was overruled, which action the defendant assigns as error.

7. It is insisted that the amended verified statement was not sufficient to authorize the taxation of said item, and in support

of his contention cites the case of *Crawford v. Abraham*, 2 Or. 163, in which it is said: "Mileage will be allowed, of course, to witnesses residing beyond the reach of ordinary subpoena within the state, unless objection is made thereto, in which case a showing must be made to sustain that item equivalent to that which is necessary under Section 785, Code, to procure a special subpoena." The statute adverted to provides, in effect, that, before a party can compel the attendance of a witness in a court of record at a place outside the county in which he resides, unless his residence is within 20 miles of such place, an affidavit must be made showing that his testimony will be material and his oral examination important or desirable, whereupon the court or judge may indorse upon the subpoena an order for the attendance of the witness, upon the service of which and the payment of double fees he must attend, if served in the state: Hill's Ann. Laws § 785. This section, construed in the light of the rule announced in the case cited, requires the prevailing party, if proper objection be made to his cost bill, to file an amended verified statement showing that the testimony of the witness who had voluntarily come from his residence in another county and more than 20 miles from the place of trial was material, and also that his oral examination was important and necessary.

8. It remains to be seen whether the defendant's objection to the item of the cost bill complained of was sufficient to impose upon the plaintiff the duty of making such a showing in his amended verified statement. The statute prescribing the form of an exception to a cost bill provides that the adverse party desiring to controvert the items thereof should file his objections thereto, stating the particulars of such objections: Hill's Ann. Laws, § 556. The objections to a cost bill should be so certain as to notify the prevailing party in what particular one or more items demanded by him are not authorized by law, or wherein the sums claimed on account of disbursements were unreasonable. It will be remembered that the defendant's objection to the item in question states to what extent the sum demanded is unreasonable, but it does not aver that the

oral examination of the witness was unimportant or unnecessary. The court, upon application therefor, possessed authority to order a witness to appear for examination, and, if the subpoena, with the order indorsed thereon, were served upon the witness in this state, he would, upon the tender of double fees, be compelled to attend a court of record outside the county in which he resides, in obedience to such order. The court having authority to compel the attendance of the witness in the first instance, must possess sufficient power to provide for the payment of his fees, when, at the request of the prevailing party, he voluntarily appears at the place of trial and testifies; provided his oral examination were important or necessary. It is argued by defendant's counsel that because the amended verified statement does not allege that Shaw's oral examination was necessary an error was committed in allowing any mileage on account of his attendance. It will be remembered that the defendant's objection to the claim for mileage of this witness is based upon the fact that, not being a resident of Marion County, he voluntarily attended as a witness at the trial, without averring that his oral examination was unimportant or unnecessary, which are particulars he now insists upon. The adverse party who excepts to the items of a cost bill must state the particulars of his objections (Hill's Ann. Laws, § 556), but, the defendant not having complied with that requirement, no error was committed in allowing the disbursements demanded, and the petition is denied.

REHEARING DENIED.

Decided 28 April; rehearing denied.

ADKINS v. MONMOUTH.

[68 Pac. 737.]

APPEAL—REVIEWING MOTION FOR NONSUIT—BILL OF EXCEPTIONS.

1. The ruling of the circuit court on a motion for nonsuit will not be reviewed on appeal unless it affirmatively appears that the bill of exceptions contains all the evidence: *First Nat. Bank v. Fire Assoc.* 33 Or. 172, and *Carney v. Dunaway*, 35 Or. 131, followed.

EVIDENCE OF AGENT AFTER TERMINATION OF AGENCY.

2. In an action against a municipal corporation for injuries from a defective sidewalk, statements by an ex-councilman as to what knowledge he had of the defect while a member of the city council were not admissible, as he could not bind the city after the termination of his term.

From Polk: GEORGE H. BURNETT, Judge.

Action for damages by Laura Adkins against the City of Monmouth. Plaintiff appeals from a judgment against her.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William H. Holmes*, and *Mr. Webster Holmes*.

For respondent there was a brief over the names of *Butler & Coad*, and *Pipes & Tift*, with an oral argument by *Mr. N. L. Butler*, and *Mr. Martin L. Pipes*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for an injury alleged to have been received by plaintiff through the failure of the defendant corporation to keep its sidewalks in repair. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, on the ground that she had not proved a case sufficient to be submitted to the jury, and the order sustaining this motion is the principal assignment of error relied on for reversal of the judgment.

1. The bill of exceptions is very meager, and simply recites, in substance, that plaintiff introduced evidence tending to show that about half past 9 o'clock on the evening of Septem-

ber 28, 1900, while she was walking carefully and at an ordinary gait along Main Street in the City of Monmouth, with a number of her lady friends, her right foot was precipitated into a hole or defect in the sidewalk caused by the removal of a board in the decking; that by reason thereof she was seriously injured, suffered great physical pain, and was prevented and hindered from pursuing her usual avocation, by which she could have earned, under ordinary circumstances, at least \$85 a month, and was compelled to, and did, expend money and incur liabilities for surgical and medical attendance, amounting to the sum of \$115; that the board was absent from the decking of the sidewalk from the 2d of September to the date of the accident, but plaintiff had no actual notice thereof, although she had passed along the walk on two different occasions within three or four days prior to the accident, but did not observe the defect, or, if she did, had forgotten it. There is no statement in the bill that it contains all or even the substance of the evidence given on behalf of the plaintiff. It has been repeatedly held that the rulings of the circuit court, on a motion for nonsuit for insufficiency of testimony, will not be reviewed on appeal unless the bill of exceptions affirmatively shows that it contains all the evidence given up to the time the motion was made: *First Nat. Bank v. Fire Assoc.* 33 Or. 172 (50 Pac. 568, 53 Pac. 8); *Carney v. Duniway*, 35 Or. 131 (57 Pac. 192, 58 Pac. 105). Indeed, so often has this doctrine been announced that it would seem to have become axiomatic. The plaintiff, however, seeks to make a distinction between an assignment of error based on the sustaining of a motion for nonsuit and one overruling such motion, but it is without merit. In either case, the question for review is the sufficiency of the testimony, and, before that can be considered on appeal, it is essential that the record affirmatively show that it is all here: 3 Cycl. Law & Proc. 166. Otherwise, a state of facts will be presumed to have been proved at the trial authorizing the ruling: 2 Ency. Pl. & Pr. 441. A motion for a nonsuit is in the nature of a demurrer to the evidence, and, necessarily, before an appellate court can review the action of the trial court

thereon, it must affirmatively appear that all the evidence which was before that court is in the record. Under the statute, a motion for a nonsuit is properly allowed when the plaintiff fails to prove a cause sufficient to be submitted to the jury: Hill's Ann. Laws, § 246. And this question can be determined only from an examination of all the evidence the sufficiency of which is challenged. It is asserted in the brief that the motion was sustained because the plaintiff failed to prove negligence on the part of the defendant, and that the bill of exceptions contains all the testimony upon that point. But that fact is not made to affirmatively appear, and we must therefore assume in favor of the ruling of the trial court, that there was other testimony which, if contained in the bill of exceptions, would show that the plaintiff was, as a matter of law, not entitled to recover. We are, therefore, constrained to hold that the ruling on the motion for a nonsuit cannot, on this record, be reviewed here.

2. The bill of exceptions discloses that during the trial the plaintiff offered to prove "certain statements alleged to have been made in April, 1901, by one Monroe Mulkey, after his term of office as councilman of the defendant had expired, and he had retired from the council, as to what knowledge he had while a member of the council of the alleged defect in the sidewalk," but the court held such testimony irrelevant and incompetent, and this ruling is assigned as error. The bill of exceptions does not disclose the nature and character of the statements or declarations alleged to have been made by Mulkey, and therefore it is doubtful whether the assignment presents any question for our consideration. But, assuming that it does, an agent cannot bind his principal by declarations made after the termination of the agency: 1 Am. & Eng. Ency. Law (2 ed.), 691; *Stiles v. Western R. Co.* 8 Metc. 44 (41 Am. Dec. 486). This rule applies to officers of a municipal corporation, who are merely its agents; so that, under any view, the alleged statements or declarations of Mulkey were not competent, because they were made after he ceased to be an agent or officer of the defendant corporation. **AFFIRMED.**

Argued 24 March; decided 21 April, 1902.

TOBIN v. PORTLAND MILLS CO.

[68 Pac. 743, 1108.]

41 209
43 486

NUMEROUS PARTIES—SUIT BY PART ON BEHALF OF ALL.

1. Ten out of a hundred persons jointly interested in a fund cannot bring a suit on behalf of all, under Section 385 of Hill's Ann. Laws, to recover and distribute such fund, where as many as thirty-four of the interested parties state in court that they are not willing to contribute to the expense of the suit. To such a suit all those entitled to share in the fund are necessary parties, and should be brought in as plaintiffs or defendants.

AFFIDAVITS AS EVIDENCE—HEARSAY.

2. In a suit by depositors of wheat in a warehouse to compel an accounting for wheat delivered by the warehouseman to defendants without the consent of the depositors, affidavits of the depositors as to the deposit, amount, and authority to remove or dispose of the wheat, made on *ex parte* examinations, and without opportunity of defendants to cross-examine, are hearsay, and inadmissible in evidence.

TENANCY IN COMMON OF WHEAT—RECEIPT STUBS AS EVIDENCE.

3. Where, in a suit by depositors of wheat in a warehouse to compel an accounting for wheat shipped by the warehouseman to defendants, without the depositors' authority, it appeared that the amount bought by defendants was more than the amount belonging to the depositors and unaccounted for, but such excess was commingled with the depositors' wheat, the defendants were tenants in common with the depositors, and parties to the transactions recorded in the warehouseman's receipt book containing the stubs of the receipts issued to the depositors, rendering them admissible in evidence as books of original entry.

HARMLESS ERROR IN ADMITTING EVIDENCE.

4. A careful examination of the evidence has satisfied the court that the error of the trial judge in admitting in evidence certain affidavits was harmless.

BAILMENT—LIABILITY OF PURCHASER.

5. Though a warehouseman in whose warehouse wheat was deposited purchased it whenever the depositors chose to dispose of it, and shipped it, and the agents of those to whom it was shipped believed he had authority to dispose of wheat delivered to them, such persons obtained no title to wheat delivered to them without the authority of the depositors, and should account to the depositors for the wheat for which they are legally responsible, in proportion to that part of the deficiency which they severally caused.

DEPOSIT WITH WAREHOUSEMAN—BAILMENT—SALE.

6. Where owners of wheat delivered it to a warehouseman, receiving either warehouse receipts reciting the receipt of wheat subject to warehouse charges for sacks and storage at a certain sum per bushel, and stored at owner's risk of loss by fire, or load checks reciting the receipt of wheat stored at owner's risk unless specially insured,—the owners expecting either to sell to the warehouseman, or secure the return of a like quantity and quality of wheat upon demand and payment of the storage charges,—the deposits were not sales, instead of bailments, and did not pass title to the warehouseman.

From Linn: REUBEN P. BOISE, Judge.

This is a suit by Ida M. Tobin, Mary Black, H. C. Davis, W. H. Gulliford, B. F. Allen, James A. Smith, John Davis, John M. Porter, Alexander Powers, and Robert Andrews against the Portland Flouring Mills Co. and the Salem Flouring Mills Co., corporations, Stephen Williamson, Robert Balfour, Robert B. Foreman, Alexander Guthrie, Robert Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and James C. Black as administrator of the estate of Thomas J. Black, deceased, to compel the defendants to account for wheat received from Black.

It is alleged in the complaint, in substance, that plaintiffs bring this suit for themselves and all others similarly interested, whose consent to become parties plaintiff could not secure, because of their number; that Thomas J. Black died intestate November 29, 1899, and the defendant James C. Black was appointed administrator of his estate, who duly qualified and entered upon the performance of his trust; that Black, at the time of his death, and for about three years prior thereto, operated warehouses at Halsey and Cummings, in Linn County, and at Derry, in Polk County, during which time he received in storage as a warehouseman large quantities of wheat, for which he issued warehouse receipts and load checks; that at the time of his death there were outstanding receipts and checks for about 40,000 bushels of wheat stored at Halsey, of which all but about 15,000 were stored prior to 1899, and for wheat at the Cummings and Derry warehouses 16,000 and 20,000 bushels, respectively; that the wheat so stored was in part sacked, and the remainder in bins, and that the title thereto was in the plaintiffs and other depositors, who at no time gave their consent to remove any part of said grain; that at the time of Black's death there were stored at Halsey about 27,000 bushels, at Cummings 18,000, and at Derry 20,000 bushels, aggregating 58,000 bushels of wheat, which quantity lacked about 13,000 bushels of meeting the demands of those holding receipts and load checks; that the decedent while operating these warehouses shipped from time to time large quantities of wheat therefrom to the defendants, without the

knowledge or consent of the plaintiffs, or other depositors, and at the time of his death there were and now are held in store by the Portland Flouring Mills Co. at Oregon City 9,296 29-60 bushels, by Balfour, Guthrie & Co. 2,446 20-60 bushels, and by the Salem Flouring Mills Co. at Salem 3,977 45-60 bushels of this wheat, the property of the plaintiffs and of those for whom this suit is instituted; that, prior to the commencement thereof, plaintiffs demanded said wheat of the defendants, but they refused to deliver any part of it; that plaintiffs cannot state how much wheat was shipped by Black to the defendants, respectively, in 1899, nor how much during the preceding years, nor how much of the loss, if any, should be sustained by the depositors, nor can they do so until a complete accounting has been made.

Plaintiffs further allege, upon information and belief, that the three buildings were conducted as one warehouse, and that the decedent paid those of the depositors who from time to time sold grain to him out of the proceeds of grain shipped indiscriminately from said warehouses; that the estate of intestate is insolvent, and unless the plaintiffs and those in behalf of whom suit is instituted can trace the grain so shipped, and now in the possession of said defendants, and wrongfully withheld by them, they are without remedy; that there are from 100 to 250 depositors who hold receipts and load checks for wheat stored in said warehouses, and that it would be impracticable, and necessitate as many suits as there are depositors, to ascertain the amount of the loss, and how much each should sustain in case the defendants are permitted to retain the wheat so delivered to them; and that a receiver should be appointed to take charge of said warehouses, in order to protect the rights of the several depositors.

A demurrer to the complaint on the ground of nonjoinder of parties plaintiff and misjoinder of parties defendant, improper joinder of causes of suit, and that the complaint did not state facts sufficient to constitute a cause of suit, having been overruled, the defendants the Portland Flouring Mills Co. and the Salem Flouring Mills Co. answered separately,

denying the material allegations of the complaint, but admitting that they had received the quantities of wheat alleged in the complaint, on account of which they had made advances, and averring that, without knowledge or notice that any other than Black had any right to said wheat, they acted in good faith, and allege that he was the owner thereof, and had authority to ship the same, and to give liens thereon for said advances. For a second defense it is alleged that Black was engaged in purchasing and selling grain in pursuance of a general and well established custom among warehousemen in Linn and Polk counties, to remove the wheat and renovate the warehouse once a year, as was well known to the depositors, who acquiesced therein, and Black had power and authority to remove said wheat, and was vested with an apparent title to it; that defendants dealt with Black in good faith, believing that he was the owner of said wheat, and had title to it and power of disposing of the same, for which reasons the plaintiffs ought not to be permitted to assert any claim thereto, except subject to the liens for such advances. It is also alleged that the defendants are distinct corporations, having no connection with each other, nor with the defendants, Balfour, Guthrie & Co., and that the plaintiffs and those on whose behalf this suit was instituted are not united in interest. The cause of suit as to Balfour, Guthrie & Co. was afterward dismissed.

Replies put in issue the allegations of new matter in the answers, whereupon a trial was had, and the testimony taken, from which the court found that there were at the time of Black's death outstanding receipts and checks for wheat received and stored at the warehouse at Halsey, 40,881 bushels, belonging to 101 depositors, stating their names, and giving the quantity of wheat deposited by each; that Black had shipped from said warehouse without the consent of the depositors 11,475 53-60 bushels of wheat, leaving only 29,306 47-60 bushels; that, of the wheat so shipped, the Portland Flouring Mills Co. received 8,424 bushels, and the Salem Flouring Mills Co. 3,051 54-60 bushels, of the value of 49 cents per bushel,—and decreed that the plaintiffs recover from the Portland Flour-

ing Mills Co. \$4,126.76, and from the Salem Flouring Mills Co. \$1,495.20, to be paid into court for distribution by the receiver among the plaintiffs and those for whose benefit the suit was instituted, as the court should thereafter determine. From which decree the Portland Flouring Mills Co. and the Salem Flouring Mills Co. appeal.

REVERSED.

For appellants there was a brief over the names of *Williams, Wood & Linthicum*, and *Sanderson Reed*, with an oral argument by *Mr. Reed*, and *Mr. Stewart B. Linthicum*.

For respondents there was a brief and an oral argument by *Mr. Jas. K. Weatherford*, and *Mr. J. R. Wyatt*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by appellants' counsel that the depositors of wheat in the warehouses are not so numerous as to entitle the plaintiffs to represent them, and that the court erred in decreeing a recovery of any wheat, or of the value thereof, in favor of any person other than the plaintiffs. That part of the decree which requires the appellants to pay into court the sums awarded, to be distributed by the receiver to those for whose benefit the suit was instituted, is sought to be justified by invoking Section 385, Hill's Ann. Laws, which is as follows: "Of the parties to the suit, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." The averment of the complaint calling this statute into requisition is as follows: "The plaintiffs, for cause of suit against the defendants, allege that they

bring this suit in their own names for themselves and on behalf of all others similarly situated and interested in the subject-matter of the suit; and plaintiffs allege, and it will more fully appear from the allegations of the complaint hereinafter contained, that it is impracticable to unite all the parties in interest herein, because they are too numerous, and scattered over such an expanse of territory that their consent to the institution of this suit cannot be first had and obtained." The wheat so deposited in the warehouse when commingled belonged to the depositors, who were tenants in common thereof, having such an undivided interest therein as the quantity stored by each bore to the amount deposited: *Brown v. Northcutt*, 14 Or. 529 (13 Pac. 485); *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197). If Black shipped to the appellants any of the wheat that belonged to the depositors, without their consent whereby a deficiency occurred in the quantity so commingled, rendering it impossible for a depositor to show the extent of his loss, a court of equity could afford relief by bringing all the parties before it, and doing complete justice between them, by ascertaining the deficiency in the joint property, and decreeing a recovery of the grain, if it could be discovered, or, failing in that respect, apportioning the loss *pro rata* among the joint owners: *Dole v. Olmstead*, 36 Ill. 150 (85 Am. Dec. 397); *Greenleaf v. Dows* (C. C.), 8 Fed. 550.

The right of the plaintiffs to maintain this suit for all the parties interested in the subject-matter is based on the averment of the complaint to the effect that the depositors are so numerous as to render it impracticable to bring them all before the court. It is a familiar rule in equity that the rights of no person shall be adjudicated unless he is present or given an opportunity to be heard, and that, when a decree is rendered affecting any subject-matter, the rights of all persons immediately interested therein shall be protected as far as they reasonably may be. Judge Story, in his work on Equity Pleading (9 ed.), § 72, in speaking upon this subject, says: "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in

the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented. Hence the common expression that courts of equity delight to do justice, and not by halves." Courts of law require no more parties to an action than those immediately interested in the subject-matter, but in equity all persons, including those remotely interested therein, may be joined, and are often necessary parties: Story, Eq. Pl. § 76. The same author, speaking of certain deviations from the rule, says: "The most usual cases arranging themselves under this head of exceptions are (1) where the question is one of a common or general interest, and one or more may sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and although they have, or may have, separate, distinct interests, yet it is impracticable to bring them all before the court": Story, Eq. Pl. § 97. Section 385, Hill's Ann. Laws, is a copy of section 119 of Howard's New York Code, except the word "suit" in the copy takes the place of the word "action." In *McKenzie v. L'Amoureux*, 11 Barb. 516, Mr. Justice HARRIS, commenting upon the exceptions spoken of by Judge Story, and explaining the adoption of the section of the code adverted to, says: "So far was the legislature from intending any change in the rule on this subject, that, in making the great changes contemplated by the adoption of the code, it was careful to preserve this convenient practice of the court of chancery. The code commissioners had reported a section, copied substantially from one of the rules of the Supreme Court of the United States, providing that those who are united in interest must be joined as plaintiffs or defendants, except that, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This, too, was the practice in the court of chancery. The legis-

lature adopted the provision thus reported, but added to the section as follows: 'And when the question is one of common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole': Code, § 119. This was also in accordance with the then existing practice of the courts of equity. The legislature seems to have apprehended that by adopting the rule reported by the commissioners it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court which then prevailed in the court of chancery."

The latter clause of Section 385 of Hill's Ann. Laws, in effect, enacts the third exception to the rule in equity, in respect to the necessity of making all persons immediately interested in the subject-matter parties, omitting therefrom, however, the words, "and although they have, or may have, separate, distinct interests." This omission cannot mean that the legislative assembly intended thereby to limit the third exception to cases in which the very numerous parties mentioned had a joint and indivisible interest in the subject-matter of the suit, for to give the statute such construction would render the exception superfluous, as the preceding clause of the section extends the second exception to that very class of parties, but limits it to a less number. It is manifest that the language so omitted was explanatory only, and is implied from the first exception in the statute, thus rendering the words omitted unnecessary; and hence the statute, instead of amending the exceptions to the rules of equity in respect of parties is a legislative recognition thereof. The decisions of the courts of equity must be examined to determine when these statutory exemptions are applicable. Judge Story, in speaking of the third exception to the general rule of equity in respect of parties, where they are very numerous, says: "In this class of cases there is usually a privity of interest between the parties,

but such privity is not the foundation of the exception. On the contrary, it is sustained in some cases where no such privity exists. However, in all of them there always exists a common interest or a common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish or to narrow or to take away. It is obvious that under such circumstances the interests of persons not actual parties to the suit may be in some measure affected by the decree, but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice": Story, Eq. Pl. (9 ed.) § 120. Mr. Pomeroy, in his work on Code Remedies (3 ed.), § 389, in commenting upon the second statutory exemption, almost identical with the third exception to the general rule of equity in respect to parties, says: "The second case depends entirely upon the number of persons who should, according to the ordinary rule, be plaintiffs or defendants. The single essential element is the impracticability of bringing all the parties before the court, on account of their great number. The language does not in terms require any question of common or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs,—so large that it would be impracticable to bring them all actually before the court,—unless the question to be determined was one of common or general interest to them all. It evidently follows, therefore, from the customary nature of litigations, that these two cases described by the statute are in practice constantly united. They constantly run into each other. In fact, it seldom if ever happens that a suit arises which falls strictly within the terms of the second case, and not within those of the first."

If it is to be assumed that each depositor had such a common interest in the wheat alleged to have been shipped by Black to the defendants, so that the plaintiffs were competent to represent them, and were authorized to institute and prosecute this suit in their behalf, and conceding that 101 depositors, by reason of an exercise of the court's discretion, come within the

designation of "very numerous parties," the question to be considered is whether it was impracticable to bring them all before the court. Each depositor made a voluntary affidavit, which was admitted in evidence over the defendant's objection and exception, showing the quantity of wheat he had stored in Black's warehouse at Halsey, and 35 of the depositors appeared as plaintiff's witnesses at the trial, several of whom testified that they were anxious to share in the results of the suit, if the wheat shipped to the defendants, or its value, could be recovered, but only one depositor expressed a willingness to bear any part of the expenses incident to the suit. The others who were interrogated on this subject either declined to answer the question, or denied any intention to bear any part of such expenses. A person materially interested in the subject-matter of a suit may, against his will, be made a party defendant, but we know of no rule whereby he can, without his consent, be joined as plaintiff. The desire of a person to be joined as a party plaintiff is indicated by a willingness to bear his share of the expenses of the trial, and while 35 of the depositors were anxious to participate in the profits of the suit, if any were realized, 34 of them, tacitly, at least, expressed their unwillingness so to contribute, thereby manifesting their dissent to being joined as plaintiffs, notwithstanding which a decree is given in their favor; thus, in effect, making them parties plaintiff against their will. Besides this, the 101 depositors, having made voluntary affidavits of their respective claims for wheat deposited at Black's warehouse at Halsey, could, if they so desired, have expressed their assent to be joined as plaintiffs, thereby demonstrating the practicability of bringing them all before the court. If the depositors had not been interrogated in respect to their willingness to pay their part of the expenses, the law would probably have presumed that, as they were anxious to secure their share of the grain alleged to have been shipped to the defendants, they were also willing to contribute their part of the expenses incurred in recovering it, or its value; but their testimony dispels such presumption, if it could ever have been invoked.

Judge Story, in his work on Equity Pleading (9 ed.), § 135a, in speaking of making all persons materially interested in the subject-matter parties, says: "When all the persons in interest can be made parties, and the decree must affect their interest, there seems to be a sound reason for insisting upon a strict adherence to the rule." In the case at bar the decree necessarily affects all the depositors, and, as they could have been made parties to the suit, the court erred in overruling the demurrer interposed on that ground, and in failing to bring before it all the depositors.

2. It will be remembered that the plaintiffs were permitted, over defendants' objection and exception, to introduce in evidence the voluntary affidavits of the depositors, of which the following is a sample:

"53.

No. 1.

STATE OF OREGON, }
County of Linn. } ss:

I, H. C. Davis, being first duly sworn, say that there was placed on storage by or for me in the warehouse operated by T. J. Black, deceased, at Halsey, in the County of Linn, State of Oregon, during the season of 1899, 1,302 55-60 bushels of wheat, and that I hold load checks issued therefor by the said T. J. Black; that I have not withdrawn any portion thereof, except ——— bushels, and that I have not sold or transferred any portion thereof, except ——— bushels, and that I have now stored 1,302 55-60 bushels thereof in said warehouse, belonging to me; that I have never at any time authorized said T. J. Black, or any one, in writing or otherwise, to ship or remove said wheat, or any portion thereof, out of said warehouse, or to pledge or hypothecate or otherwise dispose of the same, or any part thereof, to any person whomsoever.

H. C. DAVIS.

Subscribed and sworn to before me this 21st day of February, 1900.

[SEAL]

J. C. STANDISH,
Notary Public for Oregon."

These affidavits were made on *ex parte* examinations of the depositors to subserve their own interests, and, as the defendants had no opportunity to cross-examine the deponents, their

declarations are hearsay, and were inadmissible in evidence; Greenl. Ev. § 124; 2 Jones, Ev. § 302.

The transcript shows that Thomas J. Black, from 1897 to 1899, inclusive, operated grain warehouses at Halsey and Cummings, in Linn County, and during the seasons of 1898 and 1899 at Derry, in Polk County, Oregon, receiving wheat for storage therein from neighboring farmers and others, for which, upon their request, he issued warehouse receipts, of which the following is a copy:

“T. J. BLACK’S WAREHOUSE,
Halsey, Oregon, September 28, 1899.

123 50-60 bushels.

Received of A. B. Paxton by J. H. Redham on storage, one hundred twenty-three 50-60 bushels of red wheat. Subject to warehouse charges for sacks and storage at 7 cents per bushel from date to June 1st, 1900.

Stored at owner’s risk of loss by fire.

No. 106.

T. J. BLACK.”

There is indorsed on the receipt the following memorandum:

“Received of A. Wheeler, of the within wheat, 85 27-60 bush.”

J. N. Duncan, as the agent for A. B. Paxton, makes an affidavit for his principal in which he sets out a copy of said receipt, and deposes as follows: “That, as agent of said A. B. Paxton, I have said receipt in my possession; that said A. B. Paxton is still the owner of the said wheat specified in said receipt, and has never transferred the same, or any part thereof, to any one; that there are no charges or counterclaims against the same, to my knowledge, other than the said storage as set out in said receipt.” Black’s wheat ledger for 1899, having been offered in evidence, shows that there were stored in his warehouse at Halsey, on Paxton’s account, 123 50-60 bushels, for which said receipt was issued, but the ledger does not contain any memorandum of the wheat withdrawn, as apparently evidenced by the indorsement on the receipt. A. B. Paxton’s name appears in the decree as one of the deposi-

tors of wheat at Halsey, and there are awarded to him 123 50-60 bushels, which quantity helps to make up the 40,881 bushels found by the court to have been deposited in that warehouse,—evidently an error of 85 27-60 bushels. It is quite probable that this wheat was withdrawn after the affidavit was made, and the indorsement on the receipt escaped the attention of the court.

3. Black's warehouse receipt book was offered in evidence, and the stubs therein show that from 1897 to 1899, inclusive, there were issued for grain at Halsey quite a number of receipts, only three of which were offered in evidence. The other two were issued to J. K. Weatherford and to Lyman Palmer for 70 15-60 and 578 bushels of wheat, respectively, and bear no indorsement of withdrawal. A comparison of said stubs with the ledger shows that 16 receipts, besides those adverted to, appear to be outstanding. These receipts, upon demand therefor, were issued upon a surrender of, and in exchange for, load checks, of which the following is a sample:

"No. 142.

HALSEY, Or., Aug. 19, 1899.

T. I. BLACK'S WAREHOUSE.

Mr. P. A. Starr, by ——— by 30 sacks, 58 bush. 30 lbs. wheat. By sacks empty ———. To sacks trailings. Received by W. H. McMahon.

Grain is stored at owner's risk, unless specially insured. See that proper number of sacks, including empties, are entered on your check.

NOT TRANSFERABLE."

The transcript shows that, when wheat was delivered, load checks were issued, and duplicates thereof kept in stubs, from which the account of each depositor was transferred to Black's ledger. These stubs were admitted in evidence over the appellants' objection and exception, and it is maintained that an error was thus committed; the argument being that the appellants were not parties to any of the transactions therein recorded. It will be remembered that the Portland Flouring Mills Co. and the Salem Flouring Mills Co. had received from Black in 1899 9,296 26-60 and 3,977 45-60 bushels, re-

spectively, or 13,274 14-60 bushels of wheat, while the total deficiency for the several years is only 11,275 53-60 bushels, thus showing that the appellants secured a title to 1,798 21-60 bushels. This quantity, however, being commingled with the depositor's wheat, made the appellants tenants in common with them, and parties to the transactions recorded in the stubs of the check books, rendering them admissible in evidence as books of original entry.

4. The testimony shows that A. Wheeler, having been appointed receiver, took charge of said warehouses, and caused the wheat at Halsey to be weighed; and from his testimony the court found that at the time of Black's death, to wit, November 29, 1899, there were in store only 29,306 47-60 bushels; that Black had caused to be removed from the Halsey warehouse, without the depositor's consent, 11,475 53-60 bushels; and that there were due the depositors 40,881 bushels; thus showing an error in the computation of 98 20-60 bushels. A comparison of the findings of the court in respect to the quantity of wheat due the several depositors and Black's ledger shows an overallowance, in pounds, as follows: Wm. L. Uher, 30; Hugh Cummings, 10; Hugh Leeper, 30; D. H. Ambrose, 33; Joseph Webber, 10; and J. C. Bramwell, 10. By the same method it is discovered that George C. Simon and Daniel McClain should have been allowed 1 bushel each, and Peter Long 40 pounds, more than was awarded them; and these corrections, with the overallowance to Paxton, leave only 13 30-60 bushels unaccounted for, thus apparently demonstrating the accuracy of the computation, and conclusively showing that, while the affidavits to which reference has been made were improperly admitted in evidence, no material injury resulted therefrom.

5. The testimony also shows that the depositories in question were not operated by Black as one warehouse, and that the wheat received by Balfour, Guthrie & Co. was shipped from Derry, and on account thereof this suit was dismissed as to them. It also appears that no wheat had been shipped from Cummings, whereby the deficiency is located at the warehouse

at Halsey from which wheat was shipped to the appellants, and that at the time this suit was instituted, to wit, December 27, 1899, the Portland Flouring Mills Co. had received at Oregon City from Black, and then had on deposit, 9,296 29-60 bushels, on account of which it had advanced to him the sum of \$5,711.38, and that the Salem Flouring Mills Co. had received from him at Salem 3,977 46-60 bushels of wheat, on account of which it had advanced to him \$2,110.16. The greater part of the wheat so delivered to the latter corporation was destroyed by fire, and at the time this suit was begun there remained only 750 6-60 bushels, but said corporation collected from insurance companies the loss on the wheat so destroyed. The testimony discloses that, whenever the depositors chose to dispose of their wheat, Black purchased it, and shipped it to market on his own account; and, while the agents of the appellants undoubtedly believed that he had authority to dispose of the wheat delivered to them, we are satisfied that he had no title thereto, and that they should account for the wheat for which they are legally responsible. The testimony further shows that there should have been in store at Halsey certain quantities of wheat that had been deposited in 1897, 1898, and 1899, while the deficiency for the latter year is only 3,869 36-60 bushels. If Black during these years shipped wheat to no other persons or corporations than the appellants, they ought to account to the depositors for the entire deficiency, but only in proportion to that part of it which they severally caused. We think the testimony fails to show such an accounting as legally to charge the appellants with the quantities of wheat which the court finds they severally converted; but, believing that further proof upon this branch of the case can be adduced, we deem it proper, in consequence of the lack of interested parties (*Wheeler v. Lack*, 37 Or. 238, 61 Pac. 849), to send the case back, with instructions to bring in all those who are materially interested in the suit, to take additional testimony, and enter a decree in accordance therewith.

6. It is contended by appellants' counsel that the evidence

discloses that the deposits of wheat in Black's warehouse at Halsey constituted sales, and not bailments, and, this being so, the depositors had no title to or interest in the wheat delivered to the appellants, and that the court erred in decreeing the recovery of any sum as the value thereof. An examination of the receipts and load checks issued as evidence of such deposits does not show that the grain was sold to Black; nor is such a conclusion, in our opinion, supported by the testimony, which is to the effect that the depositors expected either to sell to him, or to secure the return of a like quantity and quality of wheat upon demand, and the payment of the storage charges, and that they had in most instances sold the wheat to him when they desired to dispose of it. The testimony fails to show, as in *State v. Stockman*, 30 Or. 36 (46 Pac. 851), that the wheat was delivered and received under an express agreement, or implied from the course of dealing, that Black might dispose of any part of it, and fulfill his obligation to the depositors by either paying its market value, or returning an equivalent quantity of wheat upon demand. The depositors did not, in our opinion, intend to part with the title to their wheat by placing it in the warehouse; and such intention is not inferable from the fact that they expected at some subsequent time either to sell the wheat to him, or to secure a like quantity and quality when desired. In view of another trial, we have deemed a consideration of the questions commented upon important.

Upon the payment by the plaintiffs of the defendant's costs on this appeal within sixty days, the decree will thereupon be reversed, and the cause remanded to the court below, with leave to the plaintiffs to apply to that court for permission to amend their complaint by joining such depositors as may desire to come in, and by making all others parties defendant, omitting Balfour, Guthrie & Co., and the averment that said depositories were operated as one warehouse, and for such further proceedings as may seem proper, not inconsistent with this opinion; otherwise the complaint will be dismissed without prejudice.

REVERSED.

Decided 26 May, 1902.

SUPPLEMENTARY OPINION.

MR. JUSTICE MOORE delivered the opinion.

Since the opinion in this case was handed down, our attention has been called to the fact that the appellants did not consent to the dismissal of the suit as to Balfour, Guthrie & Co., and, as the transcript discloses that they received wheat from Black that was stored at Halkey, nothing that is said in the opinion was intended to prevent interested parties from having said company, or other persons who may have received wheat from the warehouse at that place, brought in as parties hereto, and required to account for the portion thereof converted by them, respectively.

REVERSED.

Decided 21 April, 1902.

WRIGHT v. RAMP.

[68 Pac Pac. 731.]

41 286
43 56141 285
46 187

SALES—NECESSITY OF FINDINGS ON MATERIAL POINTS.

It is a rule now well established in Oregon that where a law action is tried to a court without a jury findings of fact must be made on all material issues, otherwise the judgment cannot stand: as an example, in an action to recover for a monument contracted to be delivered by plaintiff to defendant, plaintiff is not entitled to recover as for a breach of the contract, without a finding that the monument was of the kind called for by the contract, or that it was such as defendant was bound to accept, whether the contract be treated as one of sale, or for work and skill and the materials upon which they are bestowed.

From Multnomah: ARTHUR L. FRAZER, Judge.

This is an action to recover damages for a breach of contract. On August 10, 1898, the plaintiff and defendant entered into a written contract, by the terms of which the plaintiff agreed to furnish to the defendant a granite monument of a certain description, and set it up in the cemetery at Salem, in May, 1899, or as soon thereafter as possible, in a good, workmanlike manner, "to be made of best stock and best work known to the marble and granite trade, free from * * any

defects whatever, or no pay for same," for which the defendant agreed to pay, on delivery, \$350. The monument not having been furnished within the month stated in the agreement, the defendant, on July 10, 1899, through her attorneys, called plaintiff's attention to the delay, and notified him that unless the monument was erected forthwith she would refuse to receive or pay for the same, and would not longer be bound by the contract. On September 9th his attention was again called to the matter, and he was notified that the defendant "must immediately take some steps to annul the contract, as it does not now appear that you have good reason for this unreasonable and unjustifiable delay." Thereafter, and on October 4th, the plaintiff shipped a monument to Salem, but the defendant refused to receive or accept it, because it did not comply with the contract, and notified the plaintiff that the contract was rescinded. A short time thereafter this action was commenced.

The complaint alleges that prior to its commencement the plaintiff duly tendered performance of the contract on his part, but that defendant, without cause, refused to allow him to comply therewith; that ever since its execution he has been, and now is, ready and willing to perform all of its terms and conditions, and would have done so but for the refusal of the defendant to permit him; that it was not possible to deliver and set up the monument prior to the time of such tender. The answer denies the tender or offer of performance, or that plaintiff has been, or now is, ready or willing or able to perform, and, for a further defense, alleges that, in disregard of the obligations of his contract to erect a monument in the month of May, 1899, or as soon thereafter as possible, the plaintiff came to Salem on or about the 4th of October with a broken and defective monument that was not artistically or properly finished, and then and there asked for a further extension of time until he could send for a new die to take the place of one that was broken and defective; that defendant thereupon notified him that he was already in default, and that she would not allow him additional time to supply the de-

fective portion of the monument, but would treat the contract as rescinded, for the reason that he had not furnished the work within the time agreed upon, nor was the monument the kind specified in the contract. A reply was filed, putting in issue the affirmative allegations of the answer, and, by agreement of the parties, the cause was tried by the court without the intervention of a jury. The court found from the evidence that plaintiff, in accordance with the terms of his contract, put in a foundation, had a monument transported from Vermont to Salem, and was about to set it up, when the defendant, without cause, refused to allow him to do so; that it was not possible to deliver and set up the monument at an earlier date; that plaintiff was and is ready and willing to perform all the terms and conditions of the contract on his part, and would but for the acts and refusal of the defendant, have performed and fully carried out the same; that the die of the monument which the plaintiff shipped to Salem was chipped or injured in transit, but that plaintiff had another of the same material and dimensions that he offered to furnish in place of the injured one; that, by the refusal of the defendant to allow plaintiff to comply with the terms of his contract, he was damaged in the sum of \$290. A judgment was rendered in favor of the plaintiff, and defendant appeals. REVERSED.

For appellant there was a brief over the names of *Bonham & Martin*, and *Gantenbein & Veazie*, with an oral argument by *Mr. Carey F. Martin*, and *Mr. Arthur L. Veazie*.

For respondent there was a brief and an oral argument by *Mr. Arthur C. Emmons*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The record contains several assignments of error, based on the admission and rejection of testimony, which we do not deem it necessary to consider at this time, but shall confine our examination to the sufficiency of the findings of fact. Under

the pleadings, two questions of fact were presented: (1) Was there such a delay in the performance of the contract by the plaintiff as to justify the defendant in treating it as rescinded, and (2) did the monument that the plaintiff shipped to Salem fulfill the terms and conditions of his contract?

The first question is, perhaps, concluded by the findings, since the court found that it was not possible to deliver and set up the monument prior to the time the same was received at Salem. But there is no finding as to whether the monument was of the kind and quality called for by the contract. In a case of this kind, it is the duty of the vendor to deliver property corresponding with his contract. The vendee is not bound to accept a defective article and rely upon a claim for damages for indemnity, nor he is he bound to receive and pay for a thing he did not contract for or agree to accept. Mr. Mechem, in his recent work on Sales, after stating that the article delivered or demanded under the contract must be the article which the parties respectively agreed to buy and sell, and that, if they contracted in respect of a definite, ascertained, and existing article, nothing but that identical article will satisfy the contract, says: "Though the article is not definitely ascertained, or is not in existence at the time of the contract, if the undertaking is that the thing sold, when ascertained or in existence, shall be of a certain kind, or possess certain qualities or characteristics, then it is equally obvious that nothing but the article of the kind or with the qualities or characteristics agreed upon can satisfy the contract; and, again, the seller cannot be required to deliver something else, nor can the buyer be required to accept and pay for a thing different from that which he contracted to receive": Mechem, Sales, § 1155. See, also, Mechem, Sales, § 1372; *Reed v. Randall*, 29 N. Y. 358 (86 Am. Dec. 305); *Marble Co. v. Dryden*, 90 Iowa, 37 (57 N. W. 637, 48 Am. St. Rep. 417); *Meador v. Cornell*, 58 N. J. Law, 375 (33 Atl. 960). If, therefore, the contract in question is to be treated as a contract of sale, the plaintiff was bound to tender in performance thereof a monument that corresponded to the one specified in the contract,

and the defendant was not obliged to receive or accept a defective one. If the monument tendered did not correspond to the contract, she could refuse to accept it and rescind the contract: *Mechem, Sales*, § 1802; *Rubin v. Sturtevant*, 80 Fed. 930 (26 C. C. A. 259). And the same rule will apply if the agreement is to be construed as a contract for work or skill and the materials upon which it is bestowed: *Craver v. Hornburg*, 26 Kan. 94; *Moody v. Brown*, 56 Am. Dec. 640, and note. The character and quality of the monument offered by the plaintiff in performance of his contract was, therefore, a material issue in the case, and should have been directly passed upon by the trial court: *Tatum v. Massie*, 29 Or. 140 (44 Pac. 494); *Moody v. Richards*, 29 Or. 282 (45 Pac. 777); *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143); *Breding v. Williams*, 33 Or. 391 (54 Pac. 206). There is no finding that the monument was of the kind called for by the contract, or that it was such a one as the defendant was bound to receive and accept, and, until that question is determined in favor of the plaintiff, he is not entitled to recover as for a breach of the contract. The judgment is reversed, and a new trial ordered. REVERSED.

Argued 16 April; decided 3 May, 1902.

PHILOMATH v. INGLE.

[68 Pac. 803.]

TENDER AS AN ADMISSION OF LIABILITY—PLEADING.

1. The fact that a party or his attorney admits in court a liability to defendant, or makes a tender of a definite sum, is not sufficient to justify a judgment for plaintiff, unless the pleadings show a cause of action—a judgment must rest finally on the pleadings.

AID OF DEFECTIVE COMPLAINT BY VERDICT.

2. A verdict will aid an informal statement of facts in a pleading, but cannot supply an omitted material averment going to the gist of the action.

ACTION AGAINST A CITY—NEED OF HAVING CLAIM AUDITED.

3. Where the statute provides that claims against a city must be presented for audit, such a presentation is absolutely necessary before an action can be maintained on the claim—and a complaint in an action against a city for goods sold which fails to allege that plaintiff presented his account to the city recorder to be audited, as required, is fatally defective, even after verdict.

From Benton: JAMES W. HAMILTON, Judge.

This is a proceeding by writ of review. It appears from the transcript that J. W. Ingle, having commenced an action against the City of Philomath in the justice's court of District No. 9, Benton County, Oregon, alleged in his complaint that said city was a municipal corporation; that E. A. Nichols and R. F. Holm, partners as Nichols & Holm, having, at its request, sold and delivered to it certain goods, of the reasonable value of \$1.75, thereafter made an assignment for the benefit of their creditors, and the assignee sold the account to him; that he was the owner thereof; and that it was wholly unpaid. An answer having put in issue the material allegations of the complaint, a trial was had, resulting in a judgment in favor of the plaintiff in the action. A writ of review having been issued by the circuit court for said county, the judgment was annulled and the cause remanded, whereupon the attorney for the city tendered to the justice's court the sum of \$1.75, with interest, the justice's fees for issuing the summons, taking affidavits, and making the necessary docket entries, which being refused, he deposited with that court the sum of \$20, out of which said account interest and fees were to be paid, together with the costs and disbursements accruing since the receipt of the mandate, which sum was left as a tender to Ingle. The cause being again tried in the justice's court, judgment was rendered against the city for the sum of \$1.75 and costs and disbursements, taxed at \$109.70, to review which this proceeding was instituted. The petition for the writ of review sets forth, *inter alia*, as error, that the complaint does not statê facts sufficient to constitute a cause of action. The writ having been returned, and a trial had, resulting in its dismissal, the city appeals to this court. REVERSED.

For appellant there was a brief over the names of *E. L. Bryan*, and *Weatherford & Wyatt*, with an oral argument by *Mr. Bryan*, and *Mr. J. R. Wyatt*.

For respondent there was a brief over the names of *W. S. McFadden* and *E. E. Wilson*, with an oral argument by *Mr. Wilson*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by appellant's counsel that the complaint, not having alleged that Ingle presented his account to the recorder of the City of Philomath to be audited, did not state facts sufficient to constitute a cause of action, and that, this being so, the court erred in dismissing the writ of review, and in not annulling the judgment of the justice's court. It is maintained by respondent's counsel, however, that the averment so omitted was not material, and, no demurrer to the complaint having been interposed, the judgment of the justice's court cured the informal statement; besides, the appellant, having tendered the sum demanded in the complaint, thereby admitted its liability, and hence no error was committed in dismissing the writ.

1. The city failed to allege in its answer that before the action was commenced it tendered to Ingle any sum in full payment of his demand, or that it then brought said sum into court, as required by statute, to avoid the payment of further costs and expenses: Hill's Ann. Laws, § 561. Its deposit of the sum of \$20 in the justice's court for Ingle may have been an admission of its liability, but, if so, it was a matter of evidence only, and not tantamount to the statement of facts in a pleading necessary to constitute a cause of action. If at the trial in the justice's court the attorney for the city had admitted that his client was indebted to Ingle in the sum of \$1.75, such acknowledgment would undoubtedly have been sufficient to establish the claim, so far as evidence thereof was required; but it would not support a judgment therefor unless the facts stated in the complaint were sufficient for that purpose, and a tender into court of a sum of money for the adverse party can have no greater effect.

2. The question to be considered, therefore, is whether the failure to allege that Ingle presented his account to the recorder of the City of Philomath to be audited is the omission of a material averment, for, if it was essential to the maintenance of an action, the complaint will not support the judg-

ment; the rule being that a verdict aids an informal statement of facts in a pleading, but will never supply a material averment that goes to the gist of the action: *Nicolai v. Krimbel*, 29 Or. 76 (43 Pac. 865); *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Hargett v. Beardsley*, 33 Or. 301 (54 Pac. 203); *Savage v. Savage*, 36 Or. 268 (59 Pac. 461); *Chan Sing v. Portland*, 37 Or. 68 (60 Pac. 718); *Wheeler v. McFerron*, 38 Or. 105 (62 Pac. 1015).

3. A defective statement which a verdict will aid is well illustrated by the averment in the complaint to the effect that Nichols & Holm, at the request of the city, sold and delivered to it certain goods, etc. This would be an informal method of alleging that the solicitation which induced the sale and delivery was evidenced by an ordinance, if such allegation were necessary (*Beers v. Dalles City*, 16 Or. 334, 18 Pac. 835; *Ward v. Town of Forest Grove*, 20 Or. 355, 25 Pac. 1020), to comply with section 153 of the charter, which declares that the City of Philomath is not bound by any contract, or in any way liable thereon, unless the same is authorized by city ordinance (Laws, 1899, p. 284). The charter authorizes the council of the city "to appropriate money to pay the debts, liabilities and expenditures from any fund applicable thereto": Laws, 1899, p. 294, § 63. It also contains the following provisions: "All demands and accounts against the City of Philomath shall be presented to the recorder, with the necessary evidence in support thereof, and he shall audit the same and report them to the council with all convenient speed, together with any suggestion or explanation which he may deem proper and pertinent. The recorder shall draw warrants on the treasurer for all demands or accounts ordered paid by the council; provided, money has been appropriated for that purpose, and not otherwise": Laws, 1899, p. 296, § 80. "No money shall be drawn from the treasury except upon the order of the common council": Laws, 1899, p. 314, § 155. The complaint, the sufficiency of which is challenged in this proceeding, contains no intimation whatever that the Ingle account was presented to the recorder, as required by section 80 of the charter. The

legislative assembly, considering the fact that the officers of a municipality could not well seek its creditors for the purpose of paying its indebtedness, and that the only mode of securing money from the treasury on account of such demands was by warrant issued upon audited claims, undoubtedly intended, by incorporating section 80 into the charter, to impose upon the creditors of the city the duty of seeking the recorder, and presenting to him their claims arising out of the ordinary expenses of the city (*Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925), to be audited, before instituting actions thereon. In *Stackpole v. School District*, 9 Or. 508, under a statute authorizing school directors "to audit all claims against the school district, and to draw orders on the clerk for the same" (General Laws of Oregon, as compiled by Deady and Lane, Misc. Laws, Chap. IV, Title 4, § 37, subd. 6, on p. 510,) it was held that a claim against the school district should be presented to the board of school directors before the commencement of an action to recover the sum demanded, and that a complaint omitting such averment was insufficient to support a judgment rendered thereon. The editors of the American and English Encyclopaedia of Law (20 Am. & Eng. Ency. Law, 2 ed., p. 1231), in speaking of notice and presentation of claims for damages, say: "In the absence of statute or charter provision requiring it, it is not necessary, as a prerequisite to suit against a municipal corporation, that the claim or demand should have been presented for payment, or notice of injury or intent to sue given." Section 80 of the charter of Philomath does not in express terms make the presentation to the recorder of claims or demands against the city a condition precedent to the maintenance of an action thereon, but the rule is well settled that, "where the presentation of a claim or the filing of a notice is required, such notice or presentation of claim is a condition precedent to the right to maintain an action against a municipal corporation, and must be averred by the plaintiff": 14 Ency. Pl. & Pr. 235. It was necessary for Ingle to present his account to the recorder for audit, in order to entitle him to payment from the city, and it was also essen-

tial, and a condition precedent to the right to maintain his action, that he should have alleged in the complaint the facts necessary to a recovery; but, having failed to do so, the court erred in dismissing the writ of review. The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to reverse the judgment of the justice's court.

REVERSED.

Argued 10 July; decided 28 July, 1902.

STATE v. AIKEN.

(69 Pac. 683.)

CRIMINAL LAW—CONSPIRACY—APPEARANCE OF CONFEDERATE.

1. Where there is evidence in a criminal case tending to show a conspiracy between defendant and another to commit the crime charged, and that they were both present when the crime was committed, evidence of the physical appearance of defendant's alleged confederate soon after the homicide was admissible.

DECLARATIONS OF CO-CONSPIRATOR SUBSEQUENTLY MADE.

2. Statements made by one of several conspirators—not as a witness, and not in the presence of the accused—concerning the common enterprise, are not competent against another conspirator who is on trial: thus, on a prosecution for murder, it was error to admit a declaration made to another person, in defendant's absence, and after the crime was committed, by a confederate who was not then on trial, that "You ought to see the other fellow," which tended to connect defendant with the crime, and which he claimed did not refer to deceased: *State v. Hinkle*, 33 Or. 93, applied.

EFFECT OF WITHDRAWING IMPROPER EVIDENCE—HARMLESS ERROR.

3. Error in admitting evidence is cured by directing the jury to disregard it; but the instruction must make clear the evidence referred to, and a general statement that a certain kind of testimony is not to be considered will not be sufficient.

From Washington: THOMAS A. McBRIDE, Judge.

James Aiken was convicted of murder in the second degree, and appeals.

REVERSED.

For appellant there was a brief over the names of *H. T. Bagley*, *Dan J. Malarkey*, and *Geo. C. Stout*, with an oral argument by *Mr. Malarkey*, and *Mr. Stout*.

For the state there was a brief over the name of *Harrison Allen*, District Attorney, and *E. B. Tongue*, with an oral argument by *Mr. D. R. N. Blackburn*, Attorney-General, and *Mr. Allen*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant James Aiken was informed against, jointly with Henry Bacon and Budd Malim, for murder in the first degree, alleged to have been committed in Washington County on December 3, 1900, by shooting and killing one Jung Goei Shu, and, having been separately tried, was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for the term of his natural life, from which judgment he appeals.

The state, adopting the theory that the deceased was killed in pursuance of a conspiracy formed by Aiken, Bacon, and Malim, was permitted, over the defendant's objection and exception, to introduce testimony descriptive of Bacon's appearance after the homicide, and detailing certain statements made by him at that time in the absence of the defendant. In order to show the applicability to the case at bar of the legal principle relied upon for reversal, it is deemed necessary to state the substance of the testimony given at the trial: Louie How, a Chinaman, as a witness for the state, testified, in effect, that about 9 o'clock in the evening of December 3, 1900, while he and Shu were occupying the same room in a dwelling in Washington County, three white men entered the house, and one of them, coming to their room, seized Shu and tried to drag him into another room, but witness pulled him back, and, in doing so, was struck over the head with a club. The door, being suddenly closed, caught the intruder's hand, whereupon a shot was fired, killing Shu. The witness then tried to escape by a window, and was again struck over the head with a club by Aiken, whom he recognized; having known him about five years. As soon as he recovered from the effect of the blows he ran to a neighbor's, and informed him of the shooting; and, though he conversed with others, he did not tell of Aiken's participation in the homicide until about a month later, when

he saw him at the police station in Portland, for the reason that it was difficult, on account of his illness, to remember distinctly all that occurred at that time. William Woodard, who kept a saloon in Portland, appearing for the state, testified that on December 3, 1900, Aiken (being employed by him as a bartender) left his place of business about half past 5 in the evening, and about 20 minutes thereafter his codefendant Bacon called and inquired for him; but the latter, soon leaving, did not return until about 11:45 that night. The district attorney, referring to Bacon's appearance at that time, told Woodard to "state what condition he was in." An objection to this command on the ground that it was incompetent, irrelevant, and immaterial having been overruled, and an exception allowed, witness stated that "he was muddy, and had a lick over the right eye, and his clothes were torn on the shoulder." The district attorney then said: "You can give any statement Henry Bacon made." The same objection having been interposed, overruled, and an exception allowed, as in the preceding case, he answered: "Well, his brother asked him—" Here the witness was interrupted by defendant's counsel, who said, "I object to any conversation had with his brother;" but the objection having been overruled, and an exception allowed, Woodard continued: "His brother was sitting, waiting for him, and he says: 'Where the devil have you been? Where did you get that mud? You must have had a scrap.' He said he had. His brother remarked he 'must have got the worst of it.' Henry said: 'You ought to see the other fellow.' That was about all that was said. They had a drink, and then left."

This witness further testified that he did not see Aiken after he left the saloon on the evening of December 3, 1900, until the next morning, when the latter said to him: "I guess Hen (meaning Henry Bacon) killed a Chink (meaning a Chinaman) last night. He said: 'We didn't get a damn cent, either.' That one Chinaman tried to get out of a window, and he ran around the house and clubbed him, and that, when Hen fired, the Chink jumped five feet in the air, and fell,

and that he wanted to take the gun, but Hen would not give it." The witness further testified that, prior to the homicide, Wong Jim, Shu's partner, came to the saloon, and, having exhibited some money, Aiken, who seemed to know him, thereafter suggested the idea of going out to his place in Washington County and "holding him up," but the witness declined to accept the proposition. William Bacon, a witness for defendant, testified that though his brother Henry was at Woodard's saloon December 3, 1900, at 10:35 o'clock in the evening, he was not cut or bruised; that his clothes were not torn, and there was nothing peculiar in his appearance,—and, explaining the statements made in Woodard's presence, declared that his brother said he had had a fight with a fellow down town (meaning Portland), with whom he had difficulty a year before. The defendant Aiken, as a witness in his own behalf, denied all the incriminating statements imputed to him by Woodard, contradicted Louie How, and said he spent the evening of December 3, 1900, at his room in a lodging house in Portland, in company with a woman. Her deposition, taken in pursuance of a stipulation, corroborated his testimony in this particular. Several witnesses called by the defendant testified that Woodard's reputation for truth and veracity in the neighborhood in which he resided was bad, and others stated that Louie How never intimated that the defendant was present at the time of the homicide until about a month thereafter.

1. It is contended by defendant's counsel that the court erred in permitting a witness to testify concerning Bacon's appearance after the homicide, and in allowing such witness to detail his declarations made in the defendant's absence, after the termination of the alleged conspiracy, and that the error was not cured by the subsequent instruction to the jury that, if they should find a conspiracy existed, any declarations made by Aiken's codefendants after the homicide could not be accepted by them as evidence of his guilt. Woodard's testimony, if believed by the jury, tended to connect Aiken and Bacon in the commission of the crime charged in the informa-

tion; for he testified that, while Aiken was employed in his saloon, Bacon and Malim visited him every day; that Bacon called for Aiken the evening of the homicide; and that Aiken stated to the witness that Bacon shot the Chinaman, and detailed the manner in which he was killed. Testimony had been introduced tending to show that Shu was shot about 9 o'clock in the evening; that the road from the place where he was killed to Portland was muddy; and that Bacon was seen in Woodard's saloon, about six miles from the scene of the homicide, two hours and forty-five minutes after it occurred, in the condition described by Woodard. If a conspiracy existed to rob these Chinamen, and one of them was killed in the attempt, the testimony having tended to show that Aiken and Bacon were present on that occasion, notwithstanding the conspiracy had terminated, evidence of Bacon's appearance so soon after the homicide, and probably before he had an opportunity to change his apparel, was admissible as against him. Thus, in *People v. Cleveland*, 107 Mich. 367 (65 N. W. 216), it was held that where, upon a trial for assault with intent to murder, there is testimony tending to show that another person, jointly charged with the assault, accompanied the person on trial to the place of its commission, evidence of the appearance of such person shortly thereafter, tending to establish his complicity in the crime, is admissible as against the accused. To the same effect, see *State v. Struble*, 71 Iowa, 11 (32 N. W. 1); *Ryan v. State*, 83 Wis. 486 (53 N. W. 836). The rule under which evidence of the appearance of a jointly charged conspirator soon after the commission of a crime is admissible as against his confederate, who is being separately tried, is undoubtedly based upon the theory that such appearance is the necessary consequence of a joint participation in an unlawful enterprise, resulting from the undistorted rays of the after-glow of the fire of a criminal intent. The evidence of such appearance is not admissible, however, as against the accused, who is being separately tried, unless it first appears that the conspirators have made united preparation for, or jointly participated in, the commission of a crime.

2. The proper foundation having been laid, the admission of the testimony descriptive of Bacon's appearance, unaccompanied by a recital of his explanatory remarks to his brother, would not, as we have seen, furnish the defendant any ground for complaint. But the jury must have inferred from the declaration, "You ought to see the other fellow," that he referred to Shu; and this inference was undoubtedly strengthened by Woodard's testimony in relation to the mud upon his clothing, which the jury would naturally suppose was occasioned by the journey over the road in its then miry condition. After the state had rested, William Bacon, as a witness for the defendant, explained his brother's statement made in Woodard's presence; but the first impression made upon the minds of the jurors must have been that Shu, the Chinaman who was killed, was the "fellow" whose appearance should be seen, as a contrast with Bacon's condition. The declaration, "You ought to see the other fellow," when testified to by Woodard, necessarily applied to Shu; and having been made in Aiken's absence after the conspiracy had terminated, if it ever existed, such testimony was inadmissible in evidence: *State v. Magone*, 32 Or. 206 (51 Pac. 452); *State v. Hinkle*, 33 Or. 93 (54 Pac. 155). The reason for admitting evidence of the appearance of a jointly charged conspirator, as against his codefendant, at his separate trial, when the declaration of the former, made in the absence of the latter, after the commission of the crime charged, is inadmissible, must rest upon the principle that such appearance furnishes trustworthy proof of a joint participation in an offense, while the declaration is mere hearsay, and may have been made to shield a more guilty person from the consequences of his own act by shifting the responsibility upon another.

3. The court having erred in admitting the testimony complained of, the question to be considered is whether the error was cured by instructing the jury to the effect that, if they should find a conspiracy existed, any declarations made by Bacon or Malim in Aiken's absence after the homicide could not be accepted by them. A sharp conflict of judicial utter-

ance is to be found in respect to whether an error committed by admitting incompetent testimony is cured by withdrawing it: 1 Thompson, Trials, § 723. Whatever the rule may be in other states, it is quite well settled in this that an error committed by inadvertently admitting improper testimony is cured by specifically withdrawing it: *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537); *State v. McDaniel*, 39 Or. 183 (65 Pac. 520). In the case at bar, Woodard's testimony relating to Bacon's declaration, which the jury must necessarily have understood as referring to the appearance of Shu, was not specifically withdrawn. The admission of incompetent prejudicial testimony influences the minds of jurors, and, in order to remove the impressions thus created, the direction of the court not to consider such testimony must be so specific that the jurors cannot possibly mistake the instruction: *Johnson v. State*, 17 Ala. 618. The court did not admonish the jury not to consider the declaration made by Bacon to his brother in Woodard's presence, but stated to them generally not to consider any declarations made by Bacon or Malim in Aiken's absence after the commission of the homicide. This, in our opinion, was not sufficient to call the attention of the jurors to the particular testimony sought to be excluded; for they may have understood, notwithstanding the court's instruction, that the statement made by Bacon to his brother in contrasting his appearance and the condition of his clothing with that of the "other fellow," which phrase they might reasonably have believed referred to Shu, was to be considered by them, as against the defendant, in determining his guilt or innocence; and hence the judgment must be reversed, and the cause remanded for a new trial.

REVERSED.

Argued 1 April; decided 14 April, 1902; rehearing denied.

BOWERS v. STAR LOGGING CO.

[68 Pac. 516; 26 Am. & Eng. R. Cas. 800.]

MASTER AND SERVANT—EVIDENCE OF KNOWN DEFECT.

1. In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train, evidence that the brake had sometimes loosened up because of the dog's flying out of the ratchet while logs were being loaded on the cars, was admissible as tending to support plaintiff's contention that the dog failed to hold, permitting the brake to loosen, whereby he was knocked off his balance.

INSTRUCTIONS—DEFECTIVE APPLIANCE.

2. In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train through the dog failing to hold, permitting the brake to loosen, so as to knock him off his balance, a requested instruction that if plaintiff, while attempting to set the brake, slipped and fell, defendant was not liable, was properly modified by adding, "unless such slipping was caused by the defective brake."

WARNING INEXPERIENCED SERVANT—SUFFICIENCY OF EVIDENCE.

3. Plaintiff, while attempting to set a brake on defendant's logging train, lost his balance, and was run over and injured. Defendant's servants did not instruct him as to how he should do the work, nor were any of the dangers pointed out. He was about eighteen years of age, and inexperienced. He had set the brake once or twice while the cars were being loaded. When the train was coming to a down grade, a servant of defendant ordered him to set the brake on the car. Plaintiff claimed that the dog failed to hold, permitting the brake to loosen, and knock him off his balance, causing him to fall under the train. Another servant of defendant testified that plaintiff seemed excited, and as he was backing along on the ties he tripped, and fell against the car, and the sand board caught him on the right arm, and rolled him over. *Held*, that the evidence was sufficient to take the case to the jury on the question whether plaintiff was properly warned and instructed as to the dangers of the employment.

ASSUMING RISK OF EMPLOYMENT.

4. The evidence was sufficient to sustain a finding that plaintiff had not assumed the risk incident to the employment, the jury being warranted in finding that the dangers were not obvious to a person of his age and experience.

Action by Curtis Bowers, an infant, by Daniel C. Bowers, his guardian, against the Star Logging & Lumber Company. From a judgment for plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the names of *Thos. J. Clecton*, and *St. Rayner & Clark*, with an oral argument by *Mr. Clecton* and *Mr. A. B. Clark*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for a personal injury. The defendant is a corporation engaged in the logging business, and as a part of its appliances owns and operates a logging steam railroad. The cars or logging trucks are about eight feet square, and consist of a solid frame supported by four wheels. On the top and center of the frame is a beam or bolster 10 inches square, which extends out about 2 feet from the frame on either side, and upon which one end of the logs rests; the other end resting on a similar car or truck. Each pair of wheels has a brake, similar in construction to that in use on street and ordinary railroad cars, operated by a chain attached to a perpendicular rod, which extends, at the corner of the car, about 6 or 8 inches above the frame and is 5 or 6 inches below the top of the bolster. The brake is set by a horizontal crank or lever 18 inches long on the top of the brake rod, and is held in place by a ratchet and dog on the frame of the car. It is so arranged that it cannot be operated from the car, or by one riding thereon, but the operator is required to walk along the side of the moving train, reaching in with one hand to operate the brake lever, and with the other to adjust the ratchet and dog. On March 6, 1899, the plaintiff, who was about eighteen years of age, and who had been working for the defendant a week or ten days, was assigned to work on the train; and the next morning, while attempting to set the brake, fell or was thrown in front of the car, and his arm crushed so that it had to be amputated. The negligence charged is: (1) That the defendant, with knowledge that plaintiff was inexperienced, and unfamiliar with the duties of a brakeman on a logging train, or the dangers attending such work, negligently and carelessly directed him to act as one of the brakeman thereof, without giving him any notice of the danger, or cautioning him concerning the same; (2) that

the brake which the plaintiff attempted to set at the time of the accident was defective and dangerous, in that the teeth of the ratchet and dog thereof were worn and out of repair, so that they would not hold the brake. The plaintiff had a verdict and judgment, and the defendant appeals, assigning as error the admission of certain testimony, the modification by the trial court of an instruction requested by it, and the overruling of its motion for a nonsuit.

1. Thomas Day, the manager of the defendant corporation at the time of the accident, was called as a witness for the plaintiff, and, after describing the use, construction, and operation of the cars used by the defendant on its logging road, and particularly the brakes and their attachments, testified that, as a general thing, the brakes were set when the cars were being loaded. He was thereupon asked to state whether he had ever seen the dog fly out of the ratchet, and the brake unwind, when logs were being loaded on the cars, and was permitted, over defendant's objection and exception, to answer: "In some two or three instances I have, in case of a big log, sudden jar of the car; when the big log happened to be the first log, the jar would cause the dog to go off. I have seen the dog go off, and the brake loosen up. This was in cases where the rolling of the log on the car lifted one set of wheels off." It is urged that this testimony was incompetent and immaterial, because the action is not for an injury received while the cars were being loaded, nor because the defendant did not furnish a brake sufficient to hold them at such a time. The complaint, however, charges that the ratchet and dog on the car in use at the time of the accident were so worn and out of repair that they would not hold the brake. The plaintiff testified that after he set the brake he put the dog in the ratchet, but when he let loose of the brake handle the dog failed to hold, and the brake unwound, knocking him off his balance, and the end of the log or car struck him in the back, and threw him in front of the moving train. The testimony of the witness Day, was, in our opinion, competent, as tending to support this issue. It was a part of the history of the case,

and material as descriptive of the use and purpose of the brake and its attachments. It tended to show, in a general way, the working of the brake and ratchet, and the use they had been put to by the defendant, and that they did not hold at all times when the car was being used in an ordinary manner. The evidence, it is true, may have been unsatisfactory, and of little value; but its weight was for the jury to determine.

2. This view disposes of the objection to the modification of the instruction requested by the defendant to the effect that, if plaintiff slipped or stumbled while attempting to set the brake, the verdict must be for the defendant, unless, as the court added, such slipping and stumbling was caused by the brake appliances being out of repair.

We come then to the motion for nonsuit, and the request of the defendant to direct a verdict in its favor. As the question raised by these two assignments of error is to be determined by the same rule (*Huber v. Müller*, 41 Or. 103, 68 Pac. 400), they will be considered together. Upon the question as to whether the ratchet and dog were out of repair, and insufficient for the purpose intended, there is but little testimony. Substantially the only evidence upon this point is that of the witness Day that the dog sometimes failed to hold when the cars were being loaded, and of the plaintiff that at the time of the accident he put the dog in the ratchet, but it slipped out, and allowed the brake to unwind. It may be doubted whether this is sufficient to show negligence in this regard, and, if the case depended upon this point alone, the motion might, perhaps, be well taken; but, when considered in connection with the allegation that the defendant negligently and carelessly exposed an inexperienced servant to a dangerous service without sufficiently explaining to him the ordinary dangers of the employment, and the testimony in support thereof, we are of the opinion that it was properly overruled. Mr. Day, by whom the plaintiff was employed, testified that he was first set to "rustling rigging," and worked at that for a week or ten days, when he was directed by the witness to go to work on the train as the second brakeman;

that no inquiry was made of him at the time as to whether he had any experience in that character of work, but he was simply asked if he would like "a train job, and he said he would like it first rate, and that he could handle it all right; * * so I told him he could try it;" that witness did not go with him to the train, or point out any of the dangers connected with the work, nor give him any orders or directions as to how he should do his work, but that the head brakeman was supposed to attend to that matter; that the night before the accident he advised the plaintiff to take out an accident policy, because the work was dangerous, but did not tell him in what way it was dangerous.

The plaintiff testified that about two weeks before the accident he applied to Mr. Day for work, and "he asked me what I could do, and what I had done, and if I had ever worked in the woods; and I told him I had; and he asked me what I could do, and I told him my job was rustling rigging, and he told me he would give me a job,—to go to work with Pete Stewart; and I didn't know who Pete Stewart was, and I went out and went to work with a fellow that was cutting ties, and at noon they asked me why I didn't work with Pete Stewart. I told him I didn't know who he was, and I went out and worked with Neil Driscoll. And I worked with him, and they then put me to swamping. * * And I worked half a day, and came in at noon into the shanty. We had just had our dinner and we were in the shanty, and Tom Day came in and asked me if I had ever handled a jackscrew, and I told him I had, and he told me to go to work on the train. And he walked out, and didn't ask me whether I would or not. * * The only conversation I had with Mr. Day when he sent me to work on the train was that he came to me and asked me whether I had ever used a jackscrew, and I said 'Yes,' and he said, 'Well, you go and work on the train.' That's the only conversation I had with him about working on the train." The witness further testified that he had never worked on a logging train, and knew nothing about the manner in which the brakes were

constructed, or the dangers attending their use; that he did not know where to stand to set the brakes, and knew nothing about the ratchet at the time he went to work, and no one pointed out to him any of the dangers of the work; that he set the brake once or twice the day before when the logs were being loaded, but the first time he ever attempted to do so when a train was moving was at the time of the accident; that he had no recollection of either Mr. Day or the bookkeeper telling him that the work was dangerous, but did remember that they advised him to insure his life; that he worked on the train the afternoon before the accident, assisting in loading and unloading, but did not set or attempt to set the brakes when the train was moving, although he endeavored to watch Mr. Coleman when so engaged, but could not see how he did the work, and was given no instructions by any one as to how to set the brake; that the evening before the accident the train was loaded, and the next morning started to the landing, and when it came to the grade, a short distance from the camp, Coleman told the witness to get down from the engine, where he was riding, and set the brake on the car next to the engine; and further stated: "The brakes are fixed like they are on a street car, only they are straight, kind of right angle. And sometimes you have to take this dog and throw it in there. Sometimes it catches, but generally doesn't. The brake has a kind of ratchet, and I was winding this up, leaning over, walking pretty fast, as I had to, and I had wound it up about as tight as I could get it. I reached over to put the dog in to hold it there, and then the train, or the locomotive, was about going over the hill, and I saw they were going a little faster all the time, and I tried to put the dog in the ratchet to hold it, and I had it in, and when I let loose of it,—I thought it was about time for me to get out of there,—and I was leaning over the rail, and as I let loose of it, it went off of the catch, and as I started to jump the bunk or the end of the logs caught me in the back and threw me, and I fell over on the track and the pin caught me. * * I had set the catch in the ratchet, and it flew out and grazed my arm, and knocked me off my balance,

and the end of the logs on the car caught me in the back and threw me." Mr. Coleman, who was in charge of the logging train at the time of the accident, stated as a witness for defendant: "When we came to the place where we set the brakes, he (plaintiff) was supposed to set the brake there, and he said, 'All right,' and he jumped off to set the brakes. I told the engineer, 'This is a new man and a green hand,' and to be careful and watch him, and he says, 'All right'; and he jumped off the engine and went to set the brake. And I took particular notice of him, as this was the first time he set the brakes, and he seemed to be kind of excited, and he was backing along on the ties, and tripped himself, and fell against the car, and when he fell against the car he doubled himself up, and as he doubled himself up the sand board caught him on the right arm and rolled him over, and just as it caught him I hollered to the engineer to stop, and I jumped off the engine and ran, and just as I got there he was lying about three feet from the track."

3. Upon this testimony two principal questions are involved: (1) Whether there is evidence tending to show that the defendant is liable on the ground that it had not sufficiently explained to an inexperienced employe the ordinary dangers of the employment; and (2) whether, under the facts as disclosed by the testimony, the plaintiff assumed the ordinary risks of the service when he voluntarily entered upon the duties of a brakeman on the logging train. The law upon these questions is practically elementary, and the only difficulty is in applying it to the facts. The plaintiff was not necessarily negligent in obeying the orders or directions of the foreman, Day, nor did he necessarily assume the risks of the service because he accepted the employment: *Pittsburg C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151 (5 N. E. 187). As a general rule, one who seeks employment in any particular line of business, or voluntarily enters the service of another in a particular employment, assumes the ordinary risks incident to such employment, and he cannot charge the master with the consequences of his own want of knowledge or skill, for

the master may ordinarily assume that he is competent, and apprehends the danger of the service: 2 Bailey, Per. Inj. §§ 2710, 2721 b; Wood, Mast. & Serv. § 326; *Kuhns v. Wisconsin I. & N. Ry. Co.* 70 Iowa, 561 (31 N. W. 868); *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212 (7 N. W. 791); *Hathaway v. Michigan Cent. R. Co.* 51 Mich. 253 (16 N. W. 634, 47 Am. Rep. 569). But the application of this doctrine is subject to certain qualifications and limitations. It is the duty of the master not to expose an inexperienced servant, and one unfamiliar with the employment and risks attendant thereon to a dangerous service, without giving him warning of the danger, and instruction how to avoid it, unless both the danger and the means of avoiding it while he is performing the service required are apparent to the servant; and particularly is this true when the servant is ordered or directed to perform some service not contemplated in his original contract of employment: 2 Bailey, Pers. Inj. § 2664; Wood, Mast. & Serv. § 350; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. Rep. 798); *Rummel v. Dilworth*, 131 Pa. 509 (19 Atl. 345, 346, 17 Am. St. Rep. 827). Although this case, upon its facts, is very near to the border line, we are of the opinion that under all the circumstances it was the duty of the jury to apply these settled principles of law to the facts proven, and to determine whether the plaintiff knew or apprehended the danger of the service which he was directed to perform, and whether the defendant had sufficiently warned and instructed him about the danger of the business, and how to avoid it, or had done all that was reasonably necessary to protect him from injury. If the danger to which he was exposed was such an open and obvious one as that, considering his age, intelligence, and experience, he ought, in the exercise of reasonable care, to have known and appreciated it, then he assumed the risk by entering the service, and would not be entitled to recover for an injury received on account thereof. On the other hand, if the danger was not open and obvious to a person of his age, experience, and intelligence, then he did not assume the risk, unless he had been sufficiently informed of the danger. All

these questions are so much involved in doubt that they were for the jury to decide, and could not be determined by the court as a matter of law: *Davis v. St. Louis, I. M. & S. Ry. Co.* 53 Ark. 117 (13 S. W. 801, 7 L. R. A. 283); *Hughes v. Chicago, M. & St. P. Ry. Co.* 79 Wis. 264 (48 N. W. 259); *Chopin v. Badger Paper Co.* 83 Wis. 192 (53 N. W. 452); *Wolski v. Knapp-Stout, etc. Co.* 90 Wis. 178 (63 N. W. 87).

4. The testimony certainly tended to show that the position of brakeman on the logging train was a very dangerous employment, and had elements of danger that were not open and obvious to inexperienced persons. It at least required some experience to do the work safely. The plaintiff was a boy, inexperienced in that kind of work, and there is evidence tending to show that he was not adequately warned of its dangers. The judgment must therefore be affirmed.

AFFIRMED.

Decided — — — — —.

EX PARTE WARREN.

CERTIFICATE OF PROBABLE CAUSE—NECESSITY OF BILL OF EXCEPTIONS.

1. Before a justice of the supreme court can undertake to certify that there is probable cause for an appeal from a judgment in a criminal case, under Section 1440 of Hill's Ann. Laws, the bill of exceptions must have been settled by the trial judge.

NATURE OF RIGHT TO GRANT CERTIFICATE OF PROBABLE CAUSE.

2. The granting or refusal of a certificate of probable cause by a justice of the supreme court is in no sense revisory of the action of the lower court in refusing a certificate, or declining to grant a stay of execution; nor is a justice of the supreme court given by the statutes revisory power over the process of a trial court in refusing a stay of execution in a criminal case, pending the settlement of the bill of exceptions, in the absence of an abuse of discretion.

From Multnomah: MELVIN C. GEORGE, Judge.

James L. Warren was convicted of murder in the second degree and appeals. After several applications for a stay of execution had been granted, further time was refused by the trial judge, whereupon application for a stay was made to Mr.

Justice WOLVERTON, one of the members of the supreme court, and his decision on the application as a justice of the supreme court is given below. APPLICATION DENIED.

Mr. Henry St. Rayner and Mr. A. B. Clark, for the applicant.

Mr. Julius C. Moreland, contra.

MR. JUSTICE WOLVERTON.

The defendant having been convicted of murder in the second degree, and the court below having refused to grant a certificate of probable cause, he has applied here for a stay of proceedings, pending the settlement and allowance of his bill of exceptions. The court below granted a temporary stay for the purpose of enabling the petitioner to apply to a justice of this court for the certificate, but refused to extend it until the bill of exceptions could be filed. While not in exact form, the application may be considered as one, primarily, for the certificate, and, incidentally, for a stay in the mean while, thus comprising the real question sought to be presented.

The judgment was entered October 29, 1900, and an order made extending the time for the preparation of the bill of exceptions to November 29th. Subsequent orders were made further extending the time to December 10th, then to January 1, 1901, then to January 15th, and finally to February 14th. The notice of appeal was served November 5, 1900, and on the 15th the defendant applied for a certificate of probable cause. On the 7th of December, he filed his affidavit, showing that he was without means, and moved the court to direct the stenographer who acted as official reporter *pro tem.* to make a transcript of her shorthand notes of the testimony and proceedings had at the trial, at the expense of the county, which motion was overruled. He further shows that some time later he procured the necessary means, and on December 20th, through his attorney, directed the stenographer to make the transcript; that, on January 10, 1901, the district attorney

filed a motion requiring a mittimus to issue, directing the sheriff to enforce the judgment, and that thereupon the petitioner caused to be filed the affidavits of Kathryn Beck, the said stenographer, and J. F. Watts, one of the defendant's attorneys, setting forth that, owing to sickness, she (Beck) had been obliged to take a trip to Wisconsin, and that since her return she had devoted as much time to transcribing the evidence as she could consistently with the discharge of her other duties. On the 14th the court refused to issue a certificate of probable cause for the appeal, but made the order referred to staying proceedings until this application could be made.

It is urged that a justice of this court has power to stay the proceedings upon the judgment in criminal cases as an incident to his authority to issue a certificate of probable cause until such time as a bill of exceptions can be brought up, whereby to determine whether the certificate should issue. It is very apparent that this cannot be intelligently determined without the bill of exceptions, or some authenticated record showing probable error, hence it was held, in *Ex parte Wachline*, 32 Or. 204 (51 Pac. 1094), that the certificate could not be granted in the absence of such record. But it is not necessary to a determination of the controversy before me to pass upon the question of power to grant the stay. So I shall not attempt to do so at this time.

1. The court below has undoubted control over its own process, and is presumed to have exercised proper discretion touching all matters intrusted to its judgment. Its orders and judgments cannot be reviewed except by statutory authority, and it must be admitted that the granting or refusal of a certificate of probable cause is in no manner revisory, although it may be granted, even when refused by the lower court. Now, the court below has made four different orders extending the time for the defendant to prepare and file his bill of exceptions. In the mean time, the proceedings have been practically stayed until the last order was entered, January 14th, at which time the court refused to grant a further stay

except to give time to make this application. That was a determination that the execution of the judgment should not be longer delayed, while, at the same time, the court adjudged that the defendant should have more time to present a bill of exceptions. From the showing made it does not very distinctly appear that the defendant will have his bill of exceptions ready by the end of the last extension, then there will be the matter of settlement to be attended to after its presentation, which may prolong the signing. The stay is not inflexibly dependent upon the allowance of the bill of exceptions, but is a matter for separate and distinct consideration, except that the latter should be settled before a justice of this court can grant a certificate of probable cause.

2. So that it comes to the question whether, for this reason alone, a stay should be granted coextensive with the time given to complete the bill of exceptions. The statute has prescribed no such condition, nor do I think the logic of the situation requires it. Courts are usually liberal, and should always be, in giving ample opportunity to parties litigant to prosecute appeals when given under the law, to the end that they may be heard in the court of last resort, and may lose none of their rights. But the same considerations do not apply to a stay of proceedings. Here the inquiry is, does justice require it? The court below, having refused to grant a certificate of probable cause, has said, in effect, that in its opinion there was no cause for an appeal; further than this, it has directly refused to grant the stay except for temporary purposes. Thus, it has explicitly passed upon the question which I am asked to determine to the converse, while it has, under the more liberal rule, permitted further time to the defendant in which to make his appeal effective, if it is possible for him to do so. It is not so much as suggested that there has been an abuse of discretion; and, not being permitted to revise the judgment of the court below in that particular, there exists no valid ground upon which to base an inference with the control of its process. I am cited to *In re Adams*, 81 Cal. 163 (22 Pac. 547), and *People v. Lane*, 96 Cal. 596 (31 Pac. 580), as supporting

the practice which the defendant's counsel urge ought to be adopted in this jurisdiction. In the former case, the stay was granted to enable notice to be given the district attorney of the time fixed for hearing the application for the certificate of probable cause. Our statute has provided for this contingency: Hill's Ann. Laws, § 1441. In the latter case, it appears the statute gives the defendant ten days after judgment to present a draft of his bill of exceptions, and Mr. Chief Justice BEATTY held that "it was the plain duty of the superior court to stay the proceedings during the time allowed by law for preparing the bill of exceptions, and for such further time as might be necessary for its settlement, provided the defendant exercised proper diligence in its preparation;" and that the fact of the extension having been allowed for that purpose was evidence that the defendant was reasonably entitled thereto, hence, that a stay should have been granted accordingly. In the case at bar, the court has practically granted a stay for two months and a half, and, by its refusing to further extend the time, it must be assumed that the court was of the opinion that the defendant was not exercising proper diligence in the preparation of his bill of exceptions, and, while it was willing that he should have further time to prepare the same, yet it was time that the judgment should be executed. For the reasons here stated, the application will be denied.

APPLICATION FOR STAY DENIED.

Decided 3 May; rehearing denied July 7, 1902.

WOLLENBERG v. ROSE.

[68 Pac. 804.]

EQUITABLE CROSS BILL—WAIVER BY ANSWERING.

1. A demurrer to an equitable cross bill in a law action is waived by answering, and it cannot afterward be insisted that the cause should have been tried in the law forum.

REMEDY AT LAW—EQUITY—VENDOR'S LIEN.

2. Where, in an action at law for the price of wheat delivered, defendant files a cross bill in equity, under Section 381 of Hill's Ann. Laws, setting up that the wheat was delivered in part payment on a parol contract for a sale of land to plaintiff, and seeks to foreclose the vendor's interest in the land, the remedy at law is not as efficient for defendant as the bill, and the cross bill is not objectionable because it may suggest a sufficient legal defense.

PLEADING—DEFECT OF PARTIES—WAIVER BY ANSWER.

3. That a bill by an administrator to foreclose the equitable interest in lands sold by his intestate does not make the heirs of the intestate parties is not an objection after answer, the administrator alleging his readiness to furnish a good and sufficient deed.

STRICT FORECLOSURE OF EQUITABLE LIEN.

4. Where a verbal contract for the sale and purchase of land has been carried out to the extent of full delivery of possession, which the vendee retains, the contract will be strictly foreclosed in a court of equity; and it is immaterial that a bond for a deed was never delivered by the vendor as agreed upon, after taking and retaining possession.

STRICT FORECLOSURE—MUTUAL REQUIREMENTS OF DECREE.

5. When, in a suit by the vendor of land to foreclose the vendee's equitable interest, the decree requires that the defendant pay the amount due within 90 days or be foreclosed of his interest, it should require plaintiff to execute a sufficient deed contemporaneously with the payment, or suffer a dismissal of the bill.

From Douglas: JAMES W. HAMILTON, Judge.

The defendant, J. F. Rose, commenced an action at law against the plaintiff to recover \$794.30 on account of 1,075 bushels of wheat, alleged to have been sold and delivered to the firm of S. Marks & Co., of which H. Wollenberg is now the duly appointed, qualified, and acting administrator *de bonis non*. The administrator answered, denying the material allegations of the complaint, except those pertaining to his appointment and qualification as such administrator, and the presentment and rejection of the claim for said amount; and for a separate defense thereto alleged that on October 1, 1892,

he and S. Marks and A. Marks, then doing business under the firm name of S. Marks & Co., made and entered into a parol contract, whereby they agreed to sell, and Rose to purchase, a certain tract of land, being the west half of the southwest quarter of section 22, and the north half of the northwest quarter of section 27, township 28 south, range 5 west, containing 160 acres, at the agreed price of \$1,500, payable \$500 in one year, and the balance within a reasonable time, with interest on deferred payments at 8 per cent per annum from the date of the agreement; that in pursuance thereof Rose entered into the exclusive possession of said tract, and has ever since held, and now holds and occupies, the same, and that the alleged sale of wheat mentioned in the complaint as the basis of the action was made, and the said wheat delivered, in part payment of the purchase price of said land, and that by reason of the facts so alleged he had no adequate defense at law, and thereupon presented his cross bill in equity, praying that he may be allowed to file the same, and that the action be stayed, pending the determination of the suit. Plaintiff's cross bill sets up the verbal agreement concerning the land as contained in his answer to the action at law, and, further, that Rose, the defendant herein, entered into possession of said real property in pursuance of the agreement, and has ever since been and remains in possession, receiving the rents and profits therefrom, and has and now exercises the exclusive right of ownership; that defendant has paid upon the purchase price of said realty, May 9, 1893, \$485.10; November 11, 1897, \$33.12; April 10, 1899, \$251.26 and \$23.52; leaving due and payable thereon \$1,345.75, with interest from March 6, 1900; that plaintiff is ready, willing, and able to make to defendant a good and sufficient deed to said premises upon payment of the balance of the purchase money; that more than eight years have elapsed since said agreement was entered into, and the balance of said purchase price has been long since due; wherefore plaintiff prays that his lien be foreclosed, etc. A demurrer was interposed to the cross complaint for reasons (1) that the facts set forth therein constitute a legal defense to the

action at law, and (2) they are not sufficient to sustain a suit in equity. This being overruled, the defendant filed an answer, consisting of specific denials, except it is admitted that S. Marks & Co., and their heirs and assigns, or legal representatives, hold the legal title to said premises. The decree was for Wollenberg, as administrator, and the defendant appeals.

MODIFIED.

For appellant there was a brief over the name of *Commodore Stephen Jackson*, with an oral argument by *Mr. Andrew M. Crawford* and *Mr. Jackson*.

For respondent there was a brief and an oral argument by *Mr. F. W. Benson* and *Mr. J. C. Fullerton*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. It is maintained that, as plaintiff answered fully to the action at law, he was not in a position to interpose a cross bill in equity. But by answering over to the cross bill; and going to trial in the equitable forum, the defendant waived his demurrer, and the right to have the cause first tried at law.

2. The plaintiff's remedy at law, it is manifest from the cross complaint, is not as practical and efficient to satisfy the ends of justice, or as adequate, as that in equity to afford him as full relief as he is entitled to; hence the cross bill is not objectionable because it may suggest a sufficient legal defense to the action. Both these propositions were determined in *South Port. Land Co. v. Munger*, 36 Or. 457, 470 (54 Pac. 815, 60 Pac. 5). The cause of suit set forth in the cross complaint is purely equitable, and is peculiarly within the cognizance of equitable jurisdiction.

3. The objection to the complaint seems to be that the heirs of S. Marks & Co., were not made parties, it being asserted that they have acquired the legal title to the land agreed to be conveyed; but the administrator declares his readiness and ability to make a good and sufficient deed to convey the title upon payment of the demand, which is sufficient, after answer,

we think, to overcome the objection. The deed, we take it, should come from the heirs to carry a good title. The administrator, as such, could not make it, or any deed to realty, without adequate authority from a competent court. A conveyance, however, from the lawful heirs of S. Marks & Co., would satisfy the demand, and, if the administrator furnishes it, there can be no cause for complaint.

4. The proofs are clear in support of the verbal agreement as set out in the complaint. Indeed, the defendant does not deny that there was an agreement between himself and S. Marks & Co., whereby he was to purchase the land for the consideration of \$1,500; but he says, in effect, that it was never fully completed; that a bond for a deed was to have been executed by the vendors, but was never done. The fact remains, however, that the parties concerned have treated the agreement as actually in existence. Possession was delivered by S. Marks & Co. to the defendant, and he has held the same through his father from that day until this, under and by virtue of the agreement. The father has planted an orchard upon it, and otherwise improved it, and has received all the products thereof. In May following the date of the alleged agreement nearly the whole of the first payment stipulated for was made by the defendant Rose, and he has from time to time made other payments thereon, thus recognizing its existence and validity, extending down to as late a date as October 17, 1899. These facts are clearly shown, and the defendant's admissions from time to time, while continuing in the possession, tend to the same purpose, and show a completed agreement, so far as was intended, until the payments should be completed and the deed executed. A reasonable time for the payment of the balance over and above the \$500, the first payment agreed upon, has elapsed, and the whole of the purchase price has become due and payable. The conditions for the establishment and enforcement in equity of a verbal contract for the conveyance of land are present in this case,—that is, the contract in all of its terms has been clearly and satisfactorily defined and proven; and the defendant, having gone into

possession of the premises, and occupied as owner, and received the rents, issues, and profits, is not in a condition to repudiate it, even-though entered into verbally. The contract is such a one as specific performance thereof could be enforced by the vendor: *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296). This proceeding, however, is more in the nature of a foreclosure of the defendant's equitable interest in the premises, and is governed by the case of *Security Sav. Co. v. Mackenzie*, 33 Or. 209 (52 Pac. 1046), and it was so treated by the trial court.

5. The decree, however, requires that the defendant pay the amount found due on the verbal agreement within 90 days, or be foreclosed of his interest in the land. It should have gone further, and required of the plaintiff to cause to be executed and delivered to the defendant a good and sufficient deed to said premises, such as will convey the legal title contemporaneously with such payment, and, in case of default in that particular, that the cross bill be dismissed. There will accordingly be a modification of the decree of the trial court to meet this requirement.

MODIFIED.

Argued 16 October; decided 27 October, 1902.

STATE v. GULLEY.

[70 Pac. 385.]

INTOXICATING LIQUORS—NECESSITY OF GUILTY KNOWLEDGE.

1. In prosecutions for distinctly statutory offenses, such as selling liquor to minors, for example, where the statute does not make guilty knowledge an element, it is unnecessary to show an intent to violate the law, and that defendant acted in good faith on mistaken information 's not a defense.

INTOXICATING LIQUORS—IMPLIED AMENDMENT OF STATUTE.

2. Act February 20, 1891 (Laws, 1891, p. 79), enacting that if any minor over the age of sixteen shall, for the purpose of inducing any person to give or sell him intoxicating liquor, represent that he is twenty-one years of age, he shall be punished, does not impliedly modify or affect section 1913, making it a misdemeanor to sell liquor to minors.

From Linn: GEORGE H. BURNETT, Judge.

James Gulley appeals from a conviction for selling liquor to a minor.

AFFIRMED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. J. R. Wyatt*.

For the state there was a brief over the names of *Julius Newton Hart*, District Attorney, and *Percy R. Kelly*, with an oral argument by *Mr. D. R. N. Blackburn*, Attorney-General, and *Mr. Hart*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

An information having been filed against the defendant, James Gulley, charging him with the crime of selling intoxicating liquor to a minor, he entered a plea of not guilty, and, a trial being had, the court, over his exception, charged the jury, in effect, that guilty knowledge by the defendant in respect to the minority of the person to whom the intoxicating liquor was sold is not an element of the crime; that the defendant's ignorance of the fact of such person being a minor is no defense; and that, if they should find beyond a reasonable doubt that the defendant sold intoxicating liquor to a person who, at the time, was not twenty-one years old, they should find the defendant guilty as charged. An exception was also taken to the court's refusal to give the following instruction: "I instruct you in this case that if you find from the evidence that the defendant, in making sale of the liquor to the minor, as charged in the information, had no knowledge of such person being a minor, and that after the exercise of proper caution, and acting in the reasonable belief that the purchaser was of full and lawful age at the time of such sale, and made such sale as charged, although said person was in fact a minor, you have a right to take these facts into consideration, and, if you should so find, your verdict should be for the defendant. If you should find from the evidence that at the alleged sale of the liquor as charged in the information the defendant honestly believed from the appearance of the minor and his answers to questions touching this subject that he, the said minor, was of full and lawful age, and that the defendant, under all the circumstances, used reasonable and due diligence,

such as a prudent man would use, to ascertain the age of said purchaser, and after doing so was honestly deceived, you will find him not guilty." The cause being submitted, the following verdict was returned: "(1) That on the 1st day of January, A. D. 1902, in Linn County, Oregon, said defendant, James Gulley, sold and delivered to said Hreinhold Zimmerman four quarts of whisky, the same being intoxicating liquor, and received therefor from the said Hreinhold Zimmerman the sum of \$3.75; (2) that said Hreinhold Zimmerman, on the 1st day of January, A. D. 1902, was only nineteen years of age, and is a young man and a minor; (3) that before selling said whisky to said minor said defendant, James Gulley, asked said minor his age, and said minor, replied to the effect that he, the said minor, was then twenty-one years old; (4) that said defendant honestly believed said minor to be over the age of twenty-one years at the time of such sale, as charged in the information." Based upon this verdict, the defendant was sentenced to pay a fine of \$50, and to stand committed until such fine was paid, from which judgment he appeals.

1. It is contended by defendant's counsel that the court erred in charging the jury as indicated, in refusing to give the instruction requested, and in rendering the judgment complained of. The statute for the violation of which the defendant was charged is, so far as deemed applicable to the case at bar, as follows: "If any person shall sell * * any intoxicating liquor to any minor in this state, * * such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished," etc.: Hill's Ann. Laws, § 1913. It will be observed that this statute does not expressly make the vendor's knowledge of the purchaser's minority an indispensable ingredient of the crime of selling intoxicating liquor to him, and hence the instructions given and refused and the special findings of the jury present the question whether honest ignorance, or mistake of fact, in respect to the age of the purchaser, constitutes a valid defense to an information charging the commission of such crime. An irreconcilable conflict of judicial utterance exists in respect to the question pre-

sented by this appeal. It has been held under statutes like ours that no crime can be committed in the absence of a criminal intent (*Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 375); and that, where intoxicating liquor is sold to a person within the prohibited age by a vendor who exercised special caution and diligence to discover whether the applicant had attained his majority, and satisfied the jury that he made an honest inquiry to ascertain the truth, and that he reasonably believed the purchaser to be of age, a finding to that effect relieves him from criminal responsibility: *Farrell v. State*, 32 Ohio St. 456 (30 Am. Rep. 614); *Farbach v. State*, 24 Ind. 77; *Rine-man v. State*, 24 Ind. 80. On the other hand, it is held that a mistake of fact in respect to the purchaser's age constitutes no valid defense to a charge of selling intoxicating liquor to a minor (*State v. Hartfel*, 24 Wis. 61); that the vendor is bound to determine, at his peril, whether the applicant is above the inhibited age; and that, if he sells to a person who is a minor, he is criminally liable, notwithstanding he may have honestly believed that the purchaser was of lawful age: *Redmond v. State*, 36 Ark. 58 (38 Am. Rep. 24); *McCutcheon, v. People*, 69 Ill. 601.

Whichever may be the better rule, we think this court is committed to the doctrine that the vendor's belief, however honestly entertained, that a purchaser of intoxicating liquor is of lawful age, constitutes no defense to a violation of the statute prohibiting such sales to minors. Thus, in *State v. Chastian*, 19 Or. 176 (23 Pac. 963), it was held that statutes prohibiting the sale of liquors without first having obtained a license therefor are in their nature fiscal and police regulations, and make their violation indictable, irrespective of guilty knowledge. In that case the defendant, as a bartender, employed by one Scott, sold intoxicating liquor, honestly believing that his principal had secured a license to conduct the business, and in reaching the conclusion announced Mr. Justice LORD, speaking of the defendant, says: "Standing in the place of his principal, the barkeeper is bound to know, to ex-

cuse himself from liability, that his principal is licensed to sell intoxicating liquors, as otherwise he is charged with the knowledge that such sales are prohibited, and in violation of the statute. As statutes of this character bind the party to know the facts and to keep them at his peril, neither the motives nor the intent of the defendant can relieve him. When a sale is made without license, the intent is immaterial, when the statute makes the act indictable irrespective of guilty knowledge, and in such case ignorance of fact, no matter how sincere, cannot be a defense. It is enough that under the statute the commission of the act prohibited constitutes the offense, irrespective of the motives or knowledge of the defendant; and, as his principal had no license to sell, the defendant must stand for him, so far as appertains to this prosecution." So, too, in *State v. Sterritt*, 19 Or. 352 (24 Pac. 523), it was held that in an indictment charging the violation of a statute which prohibited the moving of sheep infected with scab it was not necessary to allege guilty knowledge. Mr. Justice STRAHAN, in deciding the case, says: "In a very large class of offenses, and mainly those that were classed as *mala in se* at common law, guilty knowledge is necessary to complete the offense, and it must be alleged. But in that other class, wrongs which are forbidden by statute, and more especially those offenses which are made punishable in furtherance of the public policy of the state, such as the exercise of the police powers, the collection of revenue, and the like, are punishable whether the offender had guilty knowledge or not."

It is insisted by defendant's counsel, in his argument, that the decisions in these cases are not controlling, because, in the first instance, an examination of the records of the county court would have disclosed that no license to sell intoxicating liquor had been issued, and, in the second case, an inspection of the sheep would have demonstrated that they were infected with scab. The latter case is not exactly parallel with the one at bar, so far as the appearance of the applicant for intoxicating liquor is concerned, for the immediate transition of a person from minority to majority is not so distinctly marked

by the lines of the face, the tones of the voice, or any other *indicia*, as is the appearance of cutaneous diseases in sheep. A person of ordinary intelligence, from appearance alone, ought to be able to distinguish between youth and old age, but it is not to be believed that any person, however, astute, could, by such means, determine the precise day when another person attained his majority. The case of *State v. Chastain*, 19 Or. 176 (23 Pac. 963), is in point, and refutes the argument made, for if the defendant in that case, from an inspection of the records of the county court, could have ascertained that no license had been issued to his principal, so, in the case at bar, the defendant, by examining the family records of the person to whom the intoxicating liquor was sold, could probably have discovered that he was a minor. It is not expected that such inquiry will be prosecuted before a sale of intoxicating liquor can be made to a person who may not have attained his majority; but, if the onerous duty of searching the family history were imposed, it would be identical with, but only differing in degree from, the examination of the county records.

2. It is also maintained by defendant's counsel that the act of February 20, 1891 (Laws, 1891, p. 79), modifies by implication the statute under consideration, and that, construing said acts *in pari materia*, it is implied that the vendor of intoxicating liquor must knowingly make the sale in order to come within the spirit of the law. The act to which attention is called is as follows: "If any minor over the age of sixteen years shall, for the purpose of inducing any person to give or sell to such minor any intoxicating liquor, represent to such person that such minor is twenty-one years of age or upward, such minor upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred and fifty dollars." This act, in our opinion, does not directly or by implication modify the statute for the violation of which the defendant was convicted. The duty, since the passage of the statute, has devolved upon the vendor of intoxicating liquor to determine that an applicant for the purchase

thereof is over twenty-one years of age before a sale can lawfully be made to him. If the vendor errs in judgment, he must suffer the penalty which the statute prescribes. The act of 1891 was designed for his protection; not to relieve him from the consequences of his mistake in respect to the age of a purchaser, but to punish the latter for falsely representing that he is twenty-one years old, thereby tending to restrain him from applying for intoxicating liquor, and thus protecting the vendor. From these considerations it follows that the judgment is affirmed.

AFFIRMED.

Decided 21 April, 1902.

WHITE v. LADD.

[68 Pac. 739.]

POWER OF COURTS TO VACATE VOID JUDGMENTS.

1. A court rendering a judgment void on its face has the inherent power, even on its own motion, to set the judgment aside at any time.

ATTACHMENT—RETURN OF SERVICE—NAME OF OCCUPANT.

2. The validity of an attachment, under Hill's Ann. Laws, § 149, subd. 1, does not depend upon the accuracy of the recital therein of the name of the occupant of the land levied on.

PRESUMPTION OF VALIDITY OF ATTACHMENT PROCEEDINGS.

3. Every intendment of the law favors the sufficiency of an attachment proceeding, where the writ was issued from a court of general jurisdiction, unless the writ affirmatively shows a want of jurisdiction.

ATTACHMENT AND JUDGMENT—RES JUDICATA.

4. Where, in a suit begun by attachment, the defendant died before service of summons, and service was thereupon had upon his executor, the jurisdiction of the court depended upon the validity of the attachment, and the judgment ordering the sale was, therefore, not conclusive as to the validity of the seizure of part of the property, merely because the remainder was well attached; but the question of such validity could be raised on motion to confirm the sale.

FORMER ADJUDICATION AS AN ESTOPPEL.

5. A judgment is conclusive of every fact necessary to uphold it, of all matters actually determined, and, further, of every other matter which the parties might have litigated and settled as incident to and necessarily connected with the subject-matter of the litigation, as either claim or defense, and this rule applies to both trials and defaults: *Neil v. Tolman*, 12 Or. 289, and *Glenn v. Savage*, 14 Or. 567, cited.

41	324
42	551
41	324
44	314
41	324
45	581
41	324
47	619

APPLICATION TO MOTIONS OF THE DOCTRINE OF RES ADJUDICATA.

6. Whatever may have formerly been the rule, the tendency of later cases is to apply the doctrine of *res adjudicata* to decisions upon motions, and to hold that where a point either of law or fact has been necessarily passed upon in deciding a motion that point is settled between the parties and their privies: thus, where the sufficiency of the service of an attachment to give jurisdiction to order the sale of the attached property was necessarily involved and passed upon in the determination of two motions to dismiss the attachment, and such determination has been affirmed on appeal, the question cannot be again raised on objection to the confirmation of the sale of the attached property.

RES ADJUDICATA BY JUDGMENT.

7. Where the question of the sufficiency of the service of an attachment to give jurisdiction over the property seized is raised in an amended complaint, and not controverted, the judgment ordering the sale of the property is conclusive, and the question cannot be raised on objection to the confirmation of the sale.

From Multnomah: ARTHUR L. FRAZER, Judge.

This was originally an action to recover money by Isam White against A. H. Johnson, accompanied by an attachment. Johnson was out of the state, and died a few hours after the action had been commenced. His executrix was substituted as defendant, and, upon her death, her administrator became defendant. The present appeal is from an order sustaining objections to the confirmation of a sale of part of the attached property.

REVERSED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the names of *R. & E. B. Williams*, and *Williams, Wood & Linthicum*, with an oral argument by *Mr. Stewart B. Linthicum*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is the third appeal, and the question now presented is raised by a motion to set aside a sale of attached property on execution, and to vacate the judgment directing the sale, and has relation to the sufficiency and validity of the attachment. A view in the retrospect will not be amiss, in arriving at a clear understanding of the situation. Shortly after the filing

of the complaint in this action against A. H. Johnson, and the issuance of the summons and writ of attachment, and after the appointment of Cordelia Johnson executrix of the will of defendant, who died before the summons could be served on him, to wit, on May 29, 1894, the plaintiff filed a motion for continuance, basing it upon an affidavit wherein it is averred that certain real property of the defendant had been attached, and the manner of the attachment was particularly set out, in effect as shown by the return of the sheriff; whereupon the court granted an order of continuance against the executrix, who, having been served with a copy of the complaint, summons, and order of continuance, appeared specially, and moved the court to set aside the service of summons and the order of the court continuing the action against her, "for the reason that the service of said summons is illegal, and the court had no jurisdiction to make said order." This motion was denied, and the judgment with reference to it was made the basis of an appeal to this court. A reversal was adjudged because of irregularities attending the service of summons upon the executrix: *White v. Johnson*, 27 Or. 282 (40 Pac. 511, 50 Am. St. Rep. 726). Upon the case being remanded, the plaintiff filed an amended and supplemental complaint, setting out the filing of an affidavit and undertaking, the issuance of the writ of attachment, its due execution, the appointment of Mrs. Johnson executrix, and that the cause had been continued against her as the personal representative of the original defendant. A copy was served upon the executrix, together with a copy of the summons, and in due time she appeared again specially, and moved to set aside the service of summons, and the order of the court relative to the continuance made and entered, April 6, 1896, for the reasons that no writ of attachment had been issued, and the court had no power or jurisdiction to make the order. This motion, after a full hearing, was overruled, and judgment entered adjudging and ordering, among other things, that the attached property be held and sold to satisfy the same. Another appeal was prosecuted, but the proceedings of the trial court were held to be regular,

and the judgment affirmed: *White v. Ladd*, 34 Or. 422 (56 Pac. 515).

The return of the sheriff on the writ of attachment, so far as it is involved in this controversy, is as follows:

"I further certify that I further executed the within writ of attachment on the 16th day of April, 1894, at the hour of 3 o'clock P. M. of said day, by attaching all of the right, title, and interest of the within-named defendant in and to the following described real property situated in the City of Portland, County of Multnomah, State of Oregon, to wit: 'Beginning at a point at the intersection of the north side of Park Avenue with the east side line of Ford Street, running thence northerly along the east side line of said Ford Street to its intersection with the south side line of Washington Street; thence easterly along the south side line of Washington Street to its intersection with the west side line of St. Claire Street; thence southerly along the west side line of St. Claire Street to its intersection with the north side line of Park Avenue; thence westerly along north side line of Park Avenue to place of beginning; all of said property lying and being in the City of Portland, Multnomah County, State of Oregon,'—by leaving with and delivering a copy of said writ of attachment, prepared and certified to by me as sheriff, to a Chinaman, the sole occupant thereon and thereof, whose name to me is unknown, and by filing with Henry E. Reed, Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, certificates of said attachment."

Another parcel of realty was attached under the same writ, and at the same time, about the validity of which no question is made, and has been sold and the proceeds applied towards the satisfaction of plaintiff's demand. The following portion of the above-described realty was, on August 4, 1899, sold by the sheriff under execution to satisfy the balance due upon plaintiff's judgment, and bid in by him, to wit:

"Beginning at a point in the west line of St. Claire Street, which point is 200 feet distant, measured in a northerly direction along the west line of St. Claire Street, from the point where the west line of St. Claire Street intersects the north line of Park Avenue, and running thence in a westerly direction on a line parallel with the north line of Park Avenue 300

feet, more or less, to the east line of Ford Street; thence northerly along the east line of Ford Street to a point where the east line of Ford Street intersects the south line of Wayne Street extended westerly; thence easterly on the south line of Wayne Street extended westerly to the point where the south line of Wayne Street extended westerly intersects the east line of St. Claire Street; thence southerly along the west line of St. Claire Street to the place of beginning."

When this sale came on for confirmation the defendant objected thereto, and moved the court to set it aside, and also "to set aside, vacate, and hold for naught so much of the judgment and order of sale herein as provided for the sale" of the whole of said tract, as shown by the return of the sheriff on the writ of attachment, and particularly of the tract sold under execution and bid in by plaintiff, and to set aside the attachment claimed to exist upon said realty, including the tract sold under execution, "for the reason that said attachment is not valid, * * and the court had no power to make any order of sale thereof."

The motion is based upon affidavits of the defendant and others, the defendant having been substituted for Cordelia Johnson while the case was last here on appeal. By these it is averred, among other things, that the property attached embraces and includes five distinct parcels of land, namely: One parcel embracing the property sold under execution; one embracing all of the attached property lying, adjoining, and north of the property sold; one consisting of 100 feet fronting on St. Claire Street, and extending westerly through to Ford Street, adjoining the parcel sold on the south; one consisting of the west half of the 100 feet next south, being the south 100 feet of the property attempted to be levied upon; and the other consisting of the east half thereof; that one Bickel was the owner of the said west half at the time of the levy, had a dwelling thereon, and occupied the same with his family; that the said east half was owned by one Warren, but unoccupied. The tract lying to the north of the premises sold stood in the name of William M. Ladd, as trustee for Johnson, to dispose of and apply the proceeds in payment of Johnson's

liabilities, and as to this it is averred that there was situated on the northwest corner a frame building occupied at the time. The 100 feet adjoining the property sold on the south stood in the name of Johnson, but was intended to have been conveyed to Ladd under a like trust as the property to the north, but by mutual mistake was omitted, and the 100 feet lying next south included. The deed, however, was subsequently reformed in this particular. As to this, it is averred that it, together with a portion of that sold, was fenced off so as to constitute a separate and distinct tract from the remainder, and that the other portion of the property sold was also distinct from the remainder, upon which was located the dwelling house of Johnson occupied by his family at the time. The other averments by affidavit tend to show that the premises were not occupied by a Chinaman.

The contention is that the judgment directing the sale of the real property so attached, including the property sold under execution, is void, for want of jurisdiction of the court, and is based upon the alleged invalidity of the attachment, which, it is urged, arises from an insufficient service of the writ in two particulars, namely, a copy thereof was not left with the occupant, and the attempted attachment was upon several distinct parcels of realty, including therewith property of third parties. It is maintained (1) that the validity appears upon the face of the return of the sheriff; and (2) that, if it does not so appear, it has been shown by affidavits *aliunde*, and that it is competent in a case of this kind to contradict such return and show that the facts are different from those stated therein. Plaintiff makes the point that these questions cannot be considered upon objections to the confirmation of the sale, and such objections can only extend to substantial irregularities in the proceedings concerning the sale, to the defendant's probable loss and injury: Hill's Ann. Laws, § 296, subd. 2, and *Krutz v. Batts*, 18 Wash. 460 (51 Pac. 1054). The defendant seeks to evade this point, however, and insists that his motion is to set aside and vacate the judgment as it relates to the property in dispute, as well as to set aside the sale. Of course a vaca-

tion of the judgment would be tantamount to setting the sale aside. The motion in this sense, it is insisted, is a direct attack upon the judgment, and lets in proof *aliunde* to show a want of jurisdiction in the court to render it. We are disposed, without deciding as to the regularity of the proceeding by which the question is raised, to treat the motion as one to vacate the judgment, and to consider it as such, without determining at this time whether it constitutes a direct or collateral attack thereon.

1. A judgment void upon its face may be set aside or vacated at any stage of the proceedings, or at any time, whether within the term at which it was rendered or afterwards, when the attention of the court in which it was rendered is attracted to it. Such a judgment, it has been said, "is a dead limb upon the judicial tree, which should be lopped off. * * It can bear no fruit to the plaintiff, but it is a constant menace to the defendant." This power is inherent with the court, and will be exercised, even at its own suggestion, for the preservation of its dignity, the protection of its officers, and to arrest further action, which can serve no lawful purpose, and the most effectual method is by extirpation of the judgment itself as superfluous and vexatious: *Evans v. Christian*, 4 Or. 375; *Ladd v. Mason*, 10 Or. 308; *People v. Greene*, 74 Cal. 400 (16 Pac. 197, 5 Am. St. Rep. 448); *Lee v. O'Shaughnessy*, 20 Minn. 173; *Hanson v. Wolcott*, 19 Kan. 207.

2. But we cannot assent to the proposition that the present judgment is such a one as it affects the property in question. The return of the sheriff shows that the copy of the writ was left with the occupant of the premises, who is described as a Chinaman, and whose name was unknown to the officer. The statute* does not require that the name of the occupant shall be stated, however convenient it may be as a description of the person upon whom the copy is served. If unknown, the fact affords a sufficient excuse for not stating it. It cannot be assumed, in the absence of more explicit language, that it was

*Hill's Ann. Laws, § 149, subd. 3.

the intention of the legislature that a valid service should depend in all cases upon the ascertainment of the name of the occupant. If so, the levy would fail in every instance where the occupant would refuse to give his name, or it could not otherwise, after the exercise of reasonable diligence, be accurately ascertained. Suppose the action be against Chinamen, and Chinese realty was sought to be levied upon, having a Chinese occupant; must the levy fail because these peculiarly secretive people should refuse to disclose the name of the occupant? Our attention has been called to no authority going to the exact question but the method employed can hardly be assumed to be without the reason and purview of the statute. As it pertains to the contention that separate parcels are included in one attachment, or that it extends to property not owned by the defendant, such a condition does not affirmatively appear upon the face of the return. So that the judgment rendered cannot be said to be void upon its face.

3. It is now settled law in this court that every intendment of the law is in favor of the sufficiency of the attachment, where the writ emanates from a court of superior and general jurisdiction, unless the record affirmatively shows a want of jurisdiction: *Bank of Colfax v. Richardson*, 34 Or. 518, 527 (54 Pac. 359, 75 Am. St. Rep. 664); *Schlosser v. Beemer*, 40 Or. 412 (67 Pac. 299).

4. The plaintiff contends that the matter now sought to be presented to establish the invalidity of the attachment is *res adjudicata*, and that defendant is thereby concluded by the judgment rendered. It is well understood by this time that the jurisdiction of the court to grant a continuance of the cause and to proceed against the executrix depended upon a valid attachment, and that the judgment was effectual only in so far as there was property attached. If none had been attached the action could not have been continued, and, if the attachment fails as to any, the judgment is without support as to that; so that the jurisdictional inquiry was as to what property was legally attached and brought within the jurisdiction of the court. When Johnson died the action thenceforth was

substantially *in rem*, and the inquiry was whether the court acquired jurisdiction of the property through the method adopted and pursued in serving the writ. The fact, therefore, that some property was well attached does not affect the jurisdictional question pertaining to the legality of the seizure of the remainder.

5. The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to the matters of claim and defense, and a default judgment, or one confessed, is attended with the same legal consequences, as there exist no tenable grounds of distinction between a title confessed and one tried and determined: *Barrett v. Failing*, 8 Or. 152; *Neil v. Tolman*, 12 Or. 289 (17 Pac. 103); *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Harris v. Harris*, 36 Barb. 88; *Hanson v. Manley*, 72 Iowa, 48 (33 N. W. 357); *Hobby v. Bunch*, 83 Ga. 1 (10 S. E. 113, 20 Am. St. Rep. 301); *Cromwell v. Sac County*, 94 U. S. 351. This applies where a subsequent action is sought to be maintained upon the same claim or demand. But if the second action is upon a different claim the former judgment will only operate as an estoppel against the matters actually litigated, or as to facts distinctly in issue in that action: *Applegate v. Dowell*, 15 Or. 513 (16 Pac. 651); *Cromwell v. Sac County*, 94 U. S. 351.

6. This rule is not so pervasive where applied to motions and adjudications had with reference thereto. From general declarations contained in the cases it may be gathered that the rule formerly obtained that the decision of a motion was never to be regarded in the light of *res adjudicata*, and ordinarily it may still be said that such a decision is not so far conclusive upon the parties as to prevent their drawing the same matters in question by leave of the court first had and obtained, or in the more regular form of a suit or action. The reasons which

form the basis of the rule are that motions are frequently made in the hurry of the trial, considered in a summary manner, and disposed of without full or mature consideration, and they are not the subject of review by another or higher tribunal. Such reasons have latterly been adjudged inapplicable to motions that admit of more solemn and deliberate consideration, and touching which an appeal may be prosecuted to another court and review had relative to the matters in dispute. Mr. Freeman, in his excellent work on Judgments (volume 1 [4 ed.], § 325), says of this condition: "The tendency of these decisions is to disregard the form or time of an adjudication, and to inquire whether the question really arose and was or might have been contested on the merits, and necessarily decided by the court. If so, it will generally be regarded as conclusively and finally settled, though such decision disposed of a motion, rather than of an independent action or proceeding, and especially if the action of the court was subject to review by some appropriate appellate proceeding." This was said with reference to the effect of the adjudication when drawn in question in cases other than those in which they were made and rendered. When drawn in question at another stage in the same case, strictly speaking, the principle of *res adjudicata* does not apply. Rules have grown into familiar use and practice, however, which, in the prevention of the reagitation of the same matter, operate with substantially the same potency. The trial court is endowed with a discretion respecting the renewal of a motion to be exercised only when there is something attending the former hearing to excite a suspicion of unfairness, or the parties were taken by surprise, or upon the discovery of new facts of a material nature, or the springing of new conditions, and the like, and as to these the moving party is charged with the exercise of the same degree of diligence that would be sufficient to free him from the imputation of laches if he were engaged in the regular trial of the cause. The public welfare and the dictates of common justice require that there should be an end of litigation, and the maxim is just as applicable to the judicial determination

of motions as of the cause at the final hearing. In a *resume* of the doctrine applicable in this feature Mr. Freeman again says (section 326): "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as *res adjudicata*, though the decision is the determination of a motion or summary proceeding, and not of an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon the issues of law or fact, or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting the relief sought." The foregoing observations have the support of numerous adjudications: *Dwight v. St. John*, 25 N. Y. 203; *Second Ward Bank v. Upman*, 14 Wis. 596; *Roulhac v. Brown*, 87 N. C. 1; *Grier v. Jones*, 54 Ga. 154; *Obear v. Gray*, 73 Ga. 455; *Gordinier's Appeal*, 89 Pa. 528; *Johnson v. Latta*, 84 Mo. 139; *Page v. Esty*, 54 Me. 319; *Hoge v. Norton*, 22 Kan. 374. Mr. Justice RAPALLO, in *Riggs v. Pursell*, 74 N. Y. 370, and Mr. Justice BREWER, in *Commissioners v. McIntosh*, 30 Kan. 234 (1 Pac. 572), following the New York cases, prescribe certain limitations upon the rule and confine its operation to facts actually called in question and litigated, without extending it so as to conclude the party as to a fact or facts which might have been litigated, but were not; but it is believed this limitation is without relevancy where the point subsequently insisted upon, whether based upon a legal proposition or a fact, was necessarily passed upon in the court's decision in reaching the conclusion arrived at upon the former motion: *Spitley v. Frost* (C. C.), 15 Fed. 299, and *National Bank of Port Jervis v. Hansee*, 15 Abb. N. C. 488.

Now, in the case at bar plaintiff, by his motion for a continuance against Cordelia Johnson, executrix, set forth by affidavit the facts attending the attachment. These are the same as returned by the sheriff, it is true, but the matter was

called directly to the attention of the court. The defendant, without controverting them, moved to set aside the service of the summons and the continuance, on the ground that the court was without jurisdiction to make the order, and was successful. The case was appealed without going further, and reversed because of irregularities attending the service of the summons. On the return of the case to the trial court, and after the executrix had been served with an amended and supplemental complaint and an *alias* summons, the defendant renewed her motion, basing it upon the same jurisdictional ground, and, being unsuccessful, the case was again appealed, but the decision of the trial court was affirmed. The question as to the sufficiency of the attachment was necessarily passed upon at both trials of the motion, or the judgment could not have gone that way, and this as it may affect either parcel of the realty attached. Mrs. Johnson must of necessity have been acquainted with the facts relied upon for an impeachment of the sheriff's return. True, the present administrator affirms, and, we have no doubt, truly, that he had no knowledge of such facts until recently, but it is nowhere denied that Mrs. Johnson, his predecessor, was without such information. So that the matter is not presented in a favorable light for the trial court even to grant a rehearing upon leave regularly applied for. But no such application was made, and the case has twice gone to judgment upon the motion, and twice been appealed, and the judgment of the lower court finally affirmed. So far the rulings of this court have become the law of the case, and the doctrine of *res adjudicata* applies with even greater rigor.

7. Beyond all this, however, plaintiff's amended complaint presented the jurisdictional question as to the sufficiency of the attachment in an issuable form, and the default of the defendant in failing to controvert it, and in suffering it to be taken as confessed, renders it *res adjudicata*, under the general rule relative to trials upon the merits. After such repeated trials, and the default and the confession of the defendant, and the adjudications with reference thereto, the question

now sought to be presented should have been settled for all time, and it must be so regarded. The defendant is, therefore, precluded from again litigating it by the motion interposed to vacate the judgment as to the parcel of realty now in dispute.

There being no other objections urged against the confirmation, the order of the trial court will be reversed, and the cause remanded with directions to confirm the sale on execution, and it is so ordered.

REVERSED.

Argued 17 April; decided 3 May, 1902; rehearing denied.

BOYD v. PORTLAND ELECTRIC COMPANY.

[68 Pac. 810.]

ELECTRIC WIRES—INJURY—INSTRUCTION ON RES IPSA LOQUITUR.

1. In an action against an electric light company for injuries received from contact with a broken live wire, where the complaint alleged that the wire was weak and defective and improperly strung, an instruction that if it was proved that the accident was caused by the breaking of the wire the law presumed negligence, requiring defendant to show by preponderance of the evidence that it was not at fault, was not erroneous as permitting the jury to find negligence on grounds not charged, when the jury were told that plaintiff could only recover on the negligence alleged, and that the undisputed evidence of defendant raised the presumption that the wire was sufficient in size and quality, and that it would be necessary to find, in order to find for plaintiff, that the stringing of the wire was negligently done, or that it was negligently allowed to get out of its place.

PERSONAL INJURY FROM BROKEN WIRE—EVIDENCE OF NEGLIGENCE.

2. Sometimes a court will be justified in directing a verdict for defendant at the close of the testimony because it appears that there has been no negligence: but where the plaintiff's evidence tends by more than inference to show negligence, the case must go to the jury; thus, for example, where a person injured by contact with a broken live electric wire, charged that the wires were weak and improperly strung, and showed that in a wind of not unusual velocity a wire broke from its fastening and burned through another wire, the ends of which fell across a public street and injured plaintiff, there is more than an inference of negligence, there is affirmative evidence of an improper construction of the line, requiring the consideration of the jury.

INJURY BY ELECTRIC WIRE—INSTRUCTION.

3. In an action against an electric light company for injuries received from contact with a broken live wire an instruction that where the circumstances of the accident indicated that it might have been unavoidable notwithstanding reasonable and proper care, plaintiff, charging negligence, could not recover without showing that the defendant violated a duty imposed upon it from which the injury followed as a natural sequence, was properly refused, where there was any affirmative evidence of negligence.

41	886
42	840
42	540
41	336
48	442
48	442

EVIDENCE OF CONTRIBUTORY NEGLIGENCE.

4. The evidence in this case was properly submitted to the jury to consider on both negligence and contributory negligence.

From Multnomah: ARTHUR L. FRAZER, Judge.

This is an action against the Portland General Electric Co. for damages by a minor, through his father as guardian, predicated upon the same facts as *Boyd v. Portland Elec. Co.* reported in 40 Or. 126 (7 Am. Electl. Cas. 661, 66 Pac. 576), that being an action by the father on account of the same injury complained of here. The pleadings in the two cases differing somewhat, we will adopt the statement of the latter cause, with such modifications as are necessary to show the state of the pleadings in this. The defendant is a corporation engaged in supplying the City of Portland and its inhabitants with electric light, for which purpose it has put up poles along the streets, having cross arms near the top, upon which its wires are stretched. The day before the accident, and while a storm was prevailing, two of the wires on Magnolia Street became crossed at a point some 125 feet west of Dakota Street, and about 6 or 7 o'clock in the evening the smaller one burned in two, and hung down in two loops east of the break, one of them nearly reaching the ground two or three feet west of the pole at the intersection of the streets, where it swung directly over a path used by residents of the neighborhood. The other end remained suspended from the next pole, some 150 feet west, and did not reach the ground. About the time, or soon after, the wire parted, the boy who was subsequently injured, a lad about eleven years of age, and an elder brother, passed the pole west of Dakota Street, noticed the broken wire at that place, and knew it was dangerous, but did not know anything about the other wire hanging down east of that point at the intersection of the streets. About 8 o'clock next morning, the father, who resided on Dakota Street some 200 feet south of its junction with Magnolia, sent his son on an errand which required him to travel along the path near the light pole at the

corner of the street over which the wire was suspended. A few minutes later the boy was discovered lying on the ground, immediately under the broken wire, in an insensible condition, his right hand badly burned, while he was otherwise seriously, and perhaps permanently, injured. No one witnessed the accident, and the lad was unable to give any account of how it occurred, but says that he passed out of the front gate, and ran north along Dakota Street without looking up, after which he had no recollection of what occurred. It is admitted, however, that his injury was caused by contact with the broken wire.

After setting forth in his complaint that defendant had constructed and was maintaining an electric light system upon certain streets of the City of Portland, plaintiff charges defendant with negligence, in that one of its wires suspended along and across said streets was frail, weak, and otherwise defective, and when heavily charged with electricity was at all times unsafe and insufficient, and exceedingly so during the winds and storms often prevailing in that locality; that on the evening of December 6, 1897, said frail, weak, and defective wire broke, and in breaking swung over and against another wire, heavily charged with electricity, which defendant had carelessly and negligently strung and suspended near to and alongside of it, and said broken wire hung down close to the ground, and swung and was swayed by the wind over and across said street; that strong winds were prevailing at the time, and said weak and defective wire, long before it broke, plainly showed weakness and defects in general, and especially by flashes of electricity frequently emitted therefrom, all of which defendant, its agents and employes, could, by proper diligence, have known, and did know; that defendant, its agents and employes, could by proper diligence have known, and did know, very soon after said wire was broken, and long before the injuries complained of were received, that it was so broken and suspended in the street, but that they carelessly and negligently failed and neglected to remove or repair the same, or to give warning of the danger, and allowed it to hang down and against said live wire, heavily charged with elec-

tricity, and while in said condition to swing and be swayed by the wind over and across the street so near to the ground as to endanger the lives of persons traveling thereon.

The answer denies the negligence charged, and alleges that in the vicinity of the fracture the company had put in place wires for both arc and incandescent lights; that the arc light wires were much larger and carried a greater voltage than the incandescent wires; that they were strung about a foot apart; that the wires used were of the best and most improved quality, and such as are in general use for lighting purposes; that they were sound and in all respects properly insulated, and entirely sufficient for the use to which they were applied; that they were properly strung, fastened, and supported, and were in all respects as safe and secure as proper foresight would suggest, but by some means, and for some cause unknown to the defendant, one of the incandescent wires burned off and parted, and that a portion of it formed in loops and hung suspended from an arc wire within two or three feet of the ground, but not touching it; that the company was provided with the best approved appliances for detecting the grounding of its wires, but that, owing to the fact that no short current was formed, the fracture was not indicated. Contributory negligence on the part of the plaintiff is also pleaded and relied upon as a defense. The verdict and judgment being for plaintiff at the trial, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief over the names of *Enoch B. Dufur* and *Frank Menefee*, with an oral argument by *Mr. Dufur*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The plaintiff produced two witnesses, who testified that between 6 and 7 o'clock in the evening of the day before the accident occurred they saw flashes of light running along and coming from the wires between the poles where the fracture took place, and that it terminated in an electric explosion like a roman candle, emitting sparks in all directions, and with this the phenomenon ceased. Another witness saw flashes of light about 9 o'clock the same evening at the pole where one end of the wire hung suspended, being 150 feet distant from where the accident occurred. It was further shown that the wind was blowing during the evening, from 4 to 5 o'clock, at a velocity of 40 miles an hour; from 5 to 6, at 38 miles; from 6 to 7, 30 miles; from 7 to 8, 21 miles; and from 8 to 9, 29 miles,—which was not unusual or extraordinary. Further evidence was given showing the injury by contact with the suspended wire, and the condition in which it was found, and with this the plaintiff rested, and the defendant moved for a nonsuit, but without avail. It thereupon gave evidence tending to show that the wire that parted was purchased from a reputable manufacturer, was first-class in every particular, and suitable for the purpose for which it was used; that all the wires were securely fastened, and the manner of construction was such as was in common use and according to the most approved methods; that the company maintained at its operating station a ground detector of the most approved kind, kept strict watch, and consulted it at proper intervals, but was unable thereby to discover the fracture, and was not aware of it until a report came in between 9 and 10 o'clock the next morning, when immediate steps were taken to repair it. The trial court, after analyzing the complaint, and indicating the issues tendered by the answer and reply, further stated to the jury "that the whole case turned upon the question of negligence,—negligence on the part of the defendant as claimed by the plaintiff, and negligence on the part of the plaintiff as claimed and alleged by the defendant;" and after defining the

term "negligence," and the duties and responsibilities of the defendant, gave the following instruction, among others: "In cases of this kind, gentlemen of the jury, for reasons which I need not here discuss, the law provides that where it is shown that an accident of this kind has happened, and that the accident is caused by the breaking of a wire or by something going wrong in the business of a corporation engaged, as this one was, in supplying electric lights, and it is further shown that this wire which broke and which caused the accident was the property of and in the custody and control of the defendant, the law presumes then, or raises the presumption, that the defendant was negligent, and that the accident was caused by its negligence; and if there is no further testimony in the case, excepting the testimony to show the mere fact of the breaking excepting the testimony tending to show the mere fact of the breaking of the wire, that the injury resulted from that breaking, and that the wire belonged to this defendant and was within its custody and control, then it would be your duty to find for the plaintiff; and, when that is shown,—I should say, provided that there was no contributory negligence shown on the part of the plaintiff,—the burden is shifted to the defendant to show to your minds by a preponderance of evidence that it was not at fault, and that the accident happened without any negligence or want of ordinary care upon its part."

1. The defendant's initial contention, and the one most strenuously insisted upon, is that the plaintiff should have been confined in his proofs to the allegations of negligence contained in his complaint, and upon which he relied for recovery as thereby indicated, but that instead the instruction of the court just quoted set the matter at large with the jury, and permitted them to find upon grounds not set up in the complaint; that the doctrine *res ipsa loquitur* affords no proof in support of specific or particular declarations of negligent acts, such as is relied upon here for recovery, namely, that the wire was weak, or that it was improperly strung, or that defendant neglected to repair it, and that it only has application in a case where negligence is alleged in the most general terms.

It must be conceded at the outset that the plaintiff cannot recover for acts of negligence not counted upon in the complaint. The *allegata* and *probata* must correspond, and proofs cannot be permitted to extend to the establishment of any cause not counted upon, for if such were not the rule there would be many surprises during judicial investigations, followed by injustice and wrong. Furthermore, it is a recognized principle of law that he who alleges negligence must establish it, and that the mere proof that an accident has happened raises no presumption of negligence. *Res ipsa loquitur* is a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, when from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control, management, or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property, or appliance which is the immediate cause of the accident or injury, had exercised usual and proper care and precaution with reference to it. The most usual statement of the rule is that contained in an old case (*Scott v. London Dock Co.* 3 Hurl. & C. 596), namely: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care." But, "in such case, however," says the learned author of the American State Reports, in an admirable note to *Huey v. Gahlenbeck*, 121 Pa. 238 (6 Am. St. Rep. 790, 792, 15 Atl. 520), "it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without the fault of the defendant. Such a case comes within the principle of *res ipsa loquitur*; the facts and circumstances speak for them-

selves, and, in the absence of explanation or disproof, give rise to the inference of negligence." The rule does not relieve the plaintiff from adducing any evidence within his power.

In *Bahr v. Lombard*, 53 N. J. Law, 233 (21 Atl. 190, 23 Atl. 167), a leading case upon the subject, it was held that, where the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of the accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut. The maxim or rule is, therefore, born of necessity, and entails the burden upon the defendant of showing due care when the facts are within his exclusive knowledge, so that the plaintiff cannot reasonably be expected to know or prove them. There must be something however, in the facts proven in each case, that speak of the negligence of the defendant; and the question to be propounded and solved in every such case is, do the proofs speak through inference and presumption of the negligent conduct of the defendant? These observations are supported by the uniform current of authority, and apply in all their significance to cases where the injury has been received from live wires suspended in public streets and thoroughfares, which are exclusively under the control and management of the defendant, whether natural persons or corporations: 1 *Shear. & R. Neg.* (5 ed.) §§ 59, 60; *Keasbey, Elec. Wires*, §§ 231, 233; 2 *Jaggard, Tors*, 938; *Esberg Cigar Co. v. Portland*, 34 Or. 282 (43 L. R. A. 435, 75 Am. St. Rep. 651, 55 Pac. 961); *Houston v. Brush*, 66 Vt. 331 (29 Atl. 380); *Mullen v. St. John*, 57 N. Y. 567 (15 Am. Rep. 530); *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562 (47 Am. Rep. 75); *Western Union Tel. Co. v. State to Use*, 82 Md. 293 (6 Am. Electl. Cas. 210, 51 Am. St. Rep. 464, 31 L. R. A. 572, 33 Atl. 763); *Bahr v. Lombard*, 53 N. J. Law, 233 (21 Atl. 190, 23 Atl. 167); *Excelsior Elec. Co. v. Sweet*, 57 N. J. Law 224 (30 Atl. 553); *Newark Elec. L. & P. Co. v. Ruddy*, 62 N. J. Law, 505 (7 Am. Electl. Cas. 524, 41 Atl. 712); *Thomas v. Western Union Tel. Co.* 100 Mass. 156; *Cork v. Blossom*, 162 Mass. 330 (26 L. R. A.

256, 44 Am. St. Rep. 362, 38 N. E. 495); *Haynes v. Raleigh Gas Co.* 114 N. C. 203 (5 Am. Electl. Cas. 264, 26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344); *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law, 219 (7 Am. Electl. Cas. 444, 64 Am. St. Rep. 592, 38 L. R. A. 637, 37 Atl. 730); *Cummings v. National Furnace Co.* 60 Wis. 603 (18 N. W. 742, 20 N. W. 665); *Tuttle v. Chicago R. I. & P. R. Co.* 48 Iowa 236.

Now, the plaintiff might have alleged generally, as was the case in *Chaperon v. Portland Elec. Co.* 41 Or. 39 (8 Am. Elec. Cas. — 67 Pac. 928), lately decided, that the defendant carelessly and negligently allowed one of its wires, heavily charged with electricity, to become broken and hang down upon the street, and by showing that it was so broken, suspended and charged with electricity, and the attendant circumstances of the injury so far as could be reasonably considered to be within his power, he could thereby have made it incumbent upon the defendant to disclose proper care, diligence, and precaution in all substantial details of construction and maintenance of the wires in place, and thus purge itself of the presumption of negligence arising from the facts disclosed by the plaintiff. But if the plaintiff chooses to narrow and circumscribe his cause of action, and specify and particularize the cause of the parting of the wires, and its consequent suspension upon the street, he thereby limits the inquiry to the cause designated, and none other is pertinent or can be entertained at the trial; but this does not destroy the utility or applicability of the maxim *res ipsa loquitur*, if the facts proven speak of the negligence charged. It might be much restricted and limited in its utility, but it will speak none the less within the scope of the allegations of the complaint. Two of these specifications, in effect, are that the company negligently provided a frail, weak, and otherwise defective wire, and that it was improperly strung. Now, the fact that it broke or became severed was a physical fact, which would be presumptive of negligence in supplying a weak and defective wire, and it would also imply negligence in the proper stringing of the wire, and thus call upon the defendant to explain in these particulars, but as to

none others outside of the scope of the pleadings. The fact that the pleadings are restrictive lessens the burden of the defendant, as it has notice of the particular matters of presumptive negligence, and as to this must explain, and thus rebut the inference. It follows that an instruction properly limited, touching and permitting the application of the doctrine of *res ipsa loquitur*, where the allegations are restrictive, does not set the matter at large, and permit the jury to find upon any ground of negligence they might surmise, and thus without proper notice of the cause relied upon for recovery mulct the defendant in damages. This we believe to be the doctrine of the cases, several of which are analyzed in *Boyd v. Portland Elec. Co.* 40 Or. 126 (7 Am. Electl. Cas. 661, 66 Pac. 576), and their applicability determined.

It is unnecessary to comment upon them further here, except that we believe *Snyder v. Wheeling Elec. Co.* 43 W. Va. 661 (7 Am. Electl. Cas. 473, 39 L. R. A. 499, 64 Am. St. Rep. 922, 28 S. E. 733), is so much in point that we will take the liberty, at the expense of brevity, of stating it more at large. The allegation there was that defendant negligently suffered one of its wires to be so insufficiently secured that it came down and lay in the street. Here the pleader particularized, and the court confined the proof to the allegation; yet, notwithstanding, it held the doctrine of *res ipsa loquitur* applicable. The following language of Mr. Justice BRANNON, who announced the opinion of the court, explains the holding: "It follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2,—that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction in lieu of it the jury was told that the mere fact of the injury raised no presumption of negligence, unless the proof establishing the injury showed the circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negatived the rule that the falling of the wire and injury afforded a *prima facie* case of negligence, and was beneficial to the defendant." In the case at bar the court

carefully restricted the application of the rule and doctrine to the allegations of the complaint. The jury were told, in effect, at the very outset, that the plaintiff must recover upon the negligence alleged, and, later, that the undisputed evidence of the defendant raised the presumption that the wire was sufficient in size and quality; thereby practically withdrawing this specification of negligence from their consideration. But that as to the stringing of the wire it would be necessary for them to find that it was either strung in a negligent manner in the first instance, or, after having been properly strung, it was negligently allowed to get out of position, and that defendant knew of it, or with reasonable diligence should have known of it. Thus were the jury restricted in their consideration of the presumption arising from the facts proved touching the negligence relied upon under the pleadings, and the instructions were as favorable to the defendant as it could ask.

2. Another contention is that the defendant's uncontradicted evidence clearly showed that it was not negligent in providing a suitable wire or in stringing it properly, and that the court should have directed a verdict accordingly. There are cases where the defendant's exoneration appears so palpably and unmistakably against the *prima facie* case of presumptive negligence as to warrant such a disposition of the cause. Of such are *Spaulding v. Chicago & N. W. Ry. Co.* 33 Wis. 582; *Menomonie Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 447 (65 N. W. 176). But where the evidence of the plaintiff has affirmative significance in establishing negligence, and the negligence complained of is not left wholly to inference or presumption, the question becomes a matter for the jury, to be determined by the preponderance of evidence: *Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co.* 84 Wis. 171 (53 N. W. 850); *Stacy v. Milwaukee, L. S. & W. Ry. Co.* 85 Wis. 225 (54 N. W. 779). The plaintiff produced evidence tending to show that the wire which parted was blown against another, and that the contact probably caused the weaker one to burn and the ends to hang down. This had an affirmative tendency

to show the improper adjustment of the wire, and thus, under the authorities just noted, the question of negligence became a matter for the jury in connection with defendant's attempted exoneration. These observations, with those of Mr. Chief Justice BEAN, in *Boyd v. Portland Elec. Co.* 40 Or. 126 (7 Am. Electl. Cas. 661, 66 Pac. 576), are sufficient to dispose of the contention.

The court instructed as to what constituted an act of God, and it is claimed it was without the issues made by the pleadings. It was not altogether irrelevant, however, under the testimony, and being, as we deem it, a correct exposition of the law, no error was assignable in respect to it.

3. The following instruction was asked and refused, and error is assigned, to wit: "Where the circumstances of an accident indicate that it might have been unavoidable, notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it, from which the injury followed as a natural sequence." The instruction was effective, if at all, to eliminate, by implication at least, the relevancy of the doctrine of *res ipsa loquitur*, previously applied by the court. It stands upon an inconsistent theory with that adopted by the court, and was properly refused.

4. The question of contributory negligence was for the jury. The plaintiff was a lad of about eleven years, who was sent on an errand by his father, upon the public street, where he had a right to be, and which he had a right to assume was unobstructed. While on his way his cap blew off in a wind, and, upon hastily replacing it, he ducked his head to keep the wind from his face, and, passing rapidly along, came in contact with the suspended wire. He had no previous knowledge of its presence, or no reason to believe it was there, except what inference may have been drawn from the fact that he saw a wire suspended at the further pole 150 feet distant the evening before. It was properly a matter for the jury to determine whether this was negligence in a boy of the age of plaintiff, and the instructions given sufficiently apprised the jury of

the duty of the plaintiff while in the exercise of his right to be upon the public streets.

This disposes of all the questions presented, and, being favorable to the respondent, the judgment will be affirmed.

AFFIRMED.

Argued 7 July; decided 28 July, 1902.

STATE v. WARREN.

[69 Pac. 679.]

MOTION TO DIRECT A VERDICT FOR DEFENDANT.

1. Under the established rule in Oregon, that to justify a direction to find for the defendant there must be a total failure of proof, or it must be so weak that a verdict based upon it would manifestly be unsupported, the motion in this case was properly overruled.

NAMES OF WITNESSES ON INFORMATION—STATUTES.

2. Under Laws, 1899, pp. 100, 101, § 5, providing that the name of each witness examined by a district attorney in support of any information shall be inserted at the foot of such information or indorsed thereon before it is filed, the examination of witnesses before a coroner's jury at an inquest, touching the cause of the death, is not such an examination in support of an information as will require the names of such witnesses to be indorsed on the information as a prerequisite to the right to introduce such witnesses at the trial.

BIAS OF WITNESS—CROSS AND REDIRECT EXAMINATIONS.

3. Where the defense on cross-examination of one of the state's witnesses, elicited the fact that such witness had had a fight with defendant, it was competent on redirect examination of such witness to show the cause of the fight, as bearing upon the bias of the witness.

EXPERT TESTIMONY—ORDER OF HEARING WITNESSES.

4. Where deceased was found in his room, having evidently been killed by assault, and it appeared that defendant left such room early the night before, testimony of an expert as to how long it would take blood to clot in the manner of clotted blood found in the room was admissible as tending to show how long the crime had been committed when discovered; and where such evidence was offered in chief and erroneously excluded, admitting it in rebuttal, with permission to defendant to produce evidence to meet it, and allowing it to go to the jury as a part of the state's case in chief, was not an abuse of the court's discretion.

WITNESS—TESTIMONY WITH AND WITHOUT MEMORANDUM.

5. Where a witness testified in chief independently of any memorandum, the fact that on cross-examination he testified as to other matters exclusively from a memorandum which also related to the subject of his testimony in chief was not ground for taking his testimony in chief from the jury.

41	348
43	108
41	348
46	43

COMPETENCY OF TESTIMONY ELIMINATING OTHER POSSIBILITIES.

6. On a prosecution for murder committed on board a ship, evidence as to the whereabouts of the various members of the crew on the night of the crime was admissible, as tending to increase the probability that defendant, who was the last person with deceased, committed the crime.

From Multnomah: MELVIN C. GEORGE, Judge.

The defendant James L. Warren was convicted of murder in the second degree upon an information charging him with murder in the first, and appeals from a judgment of life imprisonment. On the morning of January 24, 1900, shortly after 9 o'clock, William Kirk, the mate of the ship Clarence S. Bement, was found in his room, situated on the port side of the ship, with a contusion upon the left side of his head, and his skull fractured. The wound had been produced by some heavy instrument having a slight projection or flange on the end, making a T-shaped external cut or laceration, extending through the skull, and the left eyeball being dislodged from its socket. When found he was in his berth, occupying the end of the room opposite the door, lying on his back, with the covering drawn over his breast. His face and beard were covered and matted with blood, and blood was found upon garments which had apparently been used for staunching the flow, and upon the wall about two feet above a lounge setting against it at right angles to the berth, and upon the lounge, where there was a clot or coagulum in a depression about eight by two and a half to three inches and an inch in depth, of such consistency that it could be lifted with the hands, and elsewhere about the room. The mate was in a semiconscious state, but showed some indications of intelligence. When irritated or aroused he would say, "Go away," "I don't want you," or something of that nature; and when being removed from his berth he requested that his trousers, which had not been removed, be secured, and, when placed in the patrol wagon, inquired where they were taking him. There were some indications that the blow had been struck while he was sitting on the lounge, as blood was spattered upon the wall about the height of a man's head while sitting; and in the opinion of Dr. Wheeler, who

first attended him, he was unable thereafter to get into his berth or bunk of his own volition. He was taken to the hospital, and died at 8:30 o'clock in the evening. The defendant was an old acquaintance of the deceased, of ten years' standing, and evidently knew when the ship was due, as he was at the wharf on her arrival, Friday, January 19th. He met the mate at once when he came off, and from that time until last seen together their relations were cordial and intimate.

John J. Byrne, an important witness in the case for the prosecution, testified, among other things, that he was employed as a night watchman on the ship, and went aboard shortly before 6 o'clock Saturday evening, when he saw the mate and Warren and three sailors, Erickson, Olsen, and a little fellow called Antone; that the mate and Warren were in the mate's room when he reported for duty; that they went ashore later, and came back about 12 o'clock, both occupying the mate's room the remainder of the night; that on Sunday evening, about a quarter of 6 o'clock, when he reported to the mate, Warren was in the room with him; that they seemed to be having a sociable time; had a box of cigars, a bottle of whisky, and glasses on the desk or table beside them; that the mate said he was going to the theater, and he and Warren went off the boat about half past 7 o'clock, but returned again at 12, both apparently sober; that they chatted in the mate's room until probably 2 o'clock in the morning, when the lights were turned down; that he called the mate the next morning, and received an answer, before going off the ship; that he went aboard Monday evening again at the usual hour; saw the mate in his room, and Warren in the forecastle, drying his clothing, he having had some difficulty with the men on board; that later he went aft to the mate's room, and in a few minutes went ashore, and did not return again that night; that on Tuesday evening, when he went aboard, at 6 o'clock, or a little before, he reported to the mate in his room, and found both him and Warren there; that they seemed to be having a sociable time; had cigars, whisky, and glasses on the sideboard, as usual; that the sailors were in the forecastle, getting ready to

go ashore, and the second mate and carpenter were also on board; that these latter went ashore about 7, but before going the carpenter stepped into the mate's room, and, when he returned, exhibited some money which the mate had given him; that the second mate previously told the deceased that he would send down a bottle of whisky, and a little later one of the men (either Erickson or Olsen, probably Olsen) met witness on the gang plank and handed him a bottle, which he took to the mate's room, and found both Warren and the mate inside; that at the time there was no one on board except the mate, Warren, and witness; that Olsen, Erickson, and Antone had gone ashore; that, after passing the bottle in, witness went forward on the starboard side, but subsequently passed around to the other side of the deck, when Warren came and crossed over, and, upon meeting him, inquired if he had brought the Evening Telegram, and, on being informed that he had not, replied, "Never mind," and went to the cabin. This was about half past 7; that witness stood on the hatch for a while, looking towards shore; that about 8 o'clock Warren came forward and met him on the deck; that Erickson had returned to the ship in the meantime, and had gone to the forecabin to get some money, and witness was watching to see him come down from there, and, as he met witness, Warren walked up on the other side, Erickson stepping ashore as Warren approached, who said the old man had gone to sleep, and he was going ashore a little ways, but that he would be back in a little while,—a few minutes,—and went ashore, and that witness did not see him again that night; that, after Warren left, witness went about his duties as night watchman; that about 10 o'clock he came down from the aft deck, and thought he heard some one moving in the mate's room, and looked or glanced through one of the two portholes opening into the room nearest amidship, and saw the mate with his back to witness (the upper part of his body), resting his left hand on a desk, and leaning over as if reaching down to adjust the stove (a coal oil lamp used for heating the room, setting on the floor), or for something else lower down; that the portholes were above the

lounge, looking forward on shipboard, and at the time were partly open,—nearly halfway ; that about 11 o'clock witness passed back by the room again, being attracted by the mate's "groaning rather heavily," it being a habit of his to groan in his sleep; that he looked through the porthole and saw the mate lying on the lounge,—his left foot,—but could not say whether he had his shoes on or not,—if not, he had on black stockings,—and that he had his trousers on; that witness passed around to his door and knocked, and, receiving no answer, knocked again, when he groaned out something like "Who's there?" that witness told him, and inquired if anything was the matter, and he groaned again "No," or "All right,"—something like that; then witness asked if he could get him a cup of coffee, and he said something in a muffled tone,—"Never mind;" "It will be all right;" something like that; that when he was asleep he always woke up that way; that about 10 o'clock a Frenchman called Lhosten John came aboard, and went into the forecabin; that others of the sailors came aboard about midnight, who went to the forecabin also; that before leaving the ship on Wednesday morning, about 6, the witness helped the second mate and the carpenter aboard, who had been drinking heavily; that before going off he rapped on the mate's door, having had to rap the third time, and finally received a response, "All right;" that that was all he said any morning, except the first, when he asked witness if he had aroused the boys.

The second mate, in the presence of Rosenstine and Wolfe, his half-brother, opened the door with a key he had on his person, and found the mate at the time and in the condition above described. There was other evidence adduced to show that the mate had appointed Warren boatswain on Monday; that he served for a while, when he had trouble with the men, and the mate relieved him from duty for a time, until they became reconciled; that Warren had very little, if any, money; that on the next morning after he left the boat he purchased a first-class ticket to San Francisco, paying \$25 therefor, and departed for that place on the overland at 8 o'clock; that he saw

an account of the murder in the San Francisco papers, and was asked about it by a ship's captain to whom he applied for a position; that he then borrowed \$60 of his cousin, and purchased a ticket to St. Louis; that he was arrested in June following in Atlanta, Georgia, and at the time was going under the assumed name of J. L. Wilford, and, when brought to Portland and questioned by the chief of police, stated that he left the ship about 8:30 Tuesday evening, but declined to state where the mate was when he went off, saying that he would tell that at some other time; that he stopped in a lodging house that night, but refused to say where; and, when he was asked whether the mate was standing up or sitting down when he parted from him, answered, "I will tell you that some other time." He stated further that the mate had a good deal of money; that the second mate, the carpenter, and the boatswain had all given him money; but refused to answer whether he (Warren) obtained any money after he left the ship; and admitted that he went under the name of Wilford in Atlanta, but explained that it was on account of some financial trouble he had in Seattle. It was further shown that he had knowledge of the ship's crew, including the mate, being paid off at the customhouse, and that some of the men intrusted their earnings to him for safe-keeping. The mate's watch was missing, and what money he had on his person. Two or three days later the sum of \$400 was found where it was secreted by the mate, but it was made to appear that he had a much larger sum.

AFFIRMED.

For appellant there was a brief over the name of *St. Rayner & Clark*, with an oral argument by *Mr. Henry St. Rayner*.

For the state there was a brief over the names of *D. R. N. Blackburn*, Attorney-General, *Geo. E. Chamberlain*, District Attorney, *John Manning*, and *Arthur C. Spencer*, with an oral argument by *Mr. Blackburn*, and *Mr. Chamberlain*.

MR. JUSTICE WOLVERTON, after making the foregoing statement of the facts, delivered the opinion of the court.

1. This *resume* contains the chief features of the evidence going to connect the defendant with the commission of the crime charged. When the state rested, the defense moved the court to direct the jury to return a verdict of acquittal, and the denial of such motion constitutes one of the assignments of error. If there was evidence in the case fairly tending to show the defendant's guilt, it was properly submitted to the jury. To justify an instruction to acquit, there must be a total failure of proof, or it must be so weak that a verdict based upon it would manifestly be the result of passion, prejudice, or partiality: *State v. Pomeroy*, 30 Or. 16, 24 (46 Pac. 797); *State v. Couper*, 32 Or. 212 (49 Pac. 959); *State v. Glahn*, 97 Mo. 680 (11 S. W. 260). It is urged that the condition of the mate produced by the blow received at the hands of his assailant must have rendered him incapable of rising from the couch or reaching his bunk where he was subsequently found; and that he could not have answered the night watchman intelligently when called by him at 11 o'clock at night, and again in the morning at 6, and that therefore the deed could not have been committed until after the latter hour, at a time when it is not shown that the accused was upon the ship or in the vicinity. The theory of the state is that the assault was committed prior to 8 o'clock, Tuesday evening,—the hour when the accused was seen to leave the ship, as testified to by Byrne. This involved Byrne's testimony in some apparent discredit, because he testified that he saw the mate at 10 standing in a stooped position, and reaching down as if to adjust the lamp used for heating the room, and again, an hour later, reclining on the lounge; Dr. Wheeler being of the opinion that he could not have reached his berth without assistance. The fact is shown, however, that the mate was apparently not entirely without intelligence, because when being removed from the ship he gave a direction, and made inquiry, which unmistakably indicated as much, and when irritated or aroused he was able to make reply; so that it is possible, and not at all improbable,

that he was able to answer the night watchman, in the manner described, at 11, and again at 6 in the morning. It is possible that Byrne might have been mistaken about seeing the deceased standing in the room at 10, or upon the lounge later. He says he just glanced in at 10 o'clock, the light being turned halfway down or more; but at 11 he must have taken more pains to satisfy himself as to his condition, because after looking in at the porthole he passed around to the door, and succeeded in arousing him, and received an intelligent and satisfactory answer; and yet he may have been mistaken, also, as to seeing him on the lounge. And again, it is not beyond possibility that the mate had strength and intelligence enough left to have gotten into his berth and drawn the covering over him of his own volition. But these were all matters for the jury. There was an adequate motive shown for the deed, and the subsequent actions of the defendant were of such a character, when wholly unexplained, as they were, to lead to a strong distrust of him, so that there was evidence ample, under the theory adopted by the state, from which the jury might reasonably have inferred the defendant's connection with the crime, and hence his guilt in the commission thereof. The motion to direct a verdict was therefore properly denied.

2. Another ground of error assigned is that the court permitted the state to examine witnesses at the trial, against the accused, over his objection, whose names were not inserted at the foot of the information or indorsed thereon when filed. Preliminarily to the permission of such witnesses to testify, it was developed that the names of the only persons examined before the district attorney prior to filing the information were duly indorsed thereon; these being Erickson, Olsen, and Mc-Lauchlan. The district attorney, however, had learned what some of the witnesses would testify to through their examination before the coroner's jury, which was conducted on the part of the state by the deputy of his predecessor; and it is insisted that, having acquired such knowledge through this means, the names of all such witnesses should have been indorsed on the information; otherwise they should not have

been permitted to testify against the accused. The statute provides that the name of each witness examined on oath or affirmation by a district attorney in support of any information shall be inserted at the foot of such information or indorsed thereon before the same is filed; otherwise the testimony of such witness cannot be heard against the defendant at the trial: Laws, 1899, pp. 100, 101, § 5. This statute was enacted for a purpose, and that was evidently to afford the accused an opportunity of ascertaining the names of the witnesses with whom he would probably be confronted at the trial, and thereby be the better enabled to prepare for his defense. Such statutes are mandatory in character, and should be observed to the letter by the executive officers of the law, that the defendant may receive the full benefit designed for him by the legislature: *State v. Smith*, 33 Or. 483 (55 Pac. 534); *State v. Andrews*, 35 Or. 388, 391 (58 Pac. 765); *Stevens v. State*, 19 Neb. 647 (28 N. W. 304); *Parks v. State*, 20 Neb. 515 (31 N. W. 5); and *State v. Stevens*, 1 S. D. 480 (47 N. W. 546). We are of the opinion, however, that the examination of witnesses before a coroner's jury at an inquest, touching the cause of the death, is not such an examination in support of the information as is contemplated by the statute, and hence that the witnesses objected to were properly permitted to testify. We are inclined to give to the statute the broadest and most comprehensive application possible in furtherance of the statutory and constitutional right of the accused to a fair trial, and to enable him to prepare his defense intelligently, and to proceed therewith without any surprise being sprung upon him; and any practice tending to its restriction should be discountenanced.

3. On the cross-examination of Erickson, a witness for the state, the defense elicited the fact that witness and the defendant had a fight, in which the defendant's face was bruised; and on redirect examination witness was allowed to state, over the objection of the defendant, that the difficulty was started by the accused applying an opprobrious epithet to the witness; and the disregard of the objection is assigned as error. The

fact that a fight had occurred between the parties was elicited by the defendant on the cross-examination of the state's witness, which was pertinent and relevant in order to show the bias of the witness towards the defendant. The bare fact of a difficulty being thus established, it was not altogether irrelevant to show how it came about, as it had a bearing upon fixing the extent of the bias, and for which purpose alone it was admissible. As is said, in *Ellsworth v. Potter*, 41 Vt. 685, 689: "This testimony was not intended or calculated to show which party was in fault, but only the degree of estrangement between them. It is impractical by any general rule to fix the precise limit which should govern the admission of such evidence, and necessarily it must be left, to a considerable extent, to the discretion of the *nisi prius* court." The trial court was duly careful in guarding defendant's rights, and exercised a commendable discretion in the particular complained of, so that there was no error in allowing the state to show the origin of the estrangement, under the circumstances. See, also, *State v. Sargent*, 32 Me. 429, and *Beasley v. People*, 89 Ill. 571.

4. After the existence of the clot of blood upon the lounge had been established, the state sought to show by Dr. Wheeler the probable length of time necessary to acquire the consistency in which it was found, which the court refused to permit over the objection of the defendant. When the defendant came to offer his testimony he called Dr. Biersdorf, who testified that it takes from five to ten minutes for blood to form into a jellied condition; and then some further matter was elicited as to the length of time it would take for decomposition to set in. Dr. Wheeler, in his examination for the state, had described the clot as being in a jelly-like condition, and of such consistency that it could be lifted with the hands, and, being called in rebuttal, was permitted to testify, over objection, that, in his opinion, it would take from nine to twelve hours for blood to get in the condition in which it was found; and error is predicated on the ruling. The reason given for the objection was that the testimony sought to be introduced was touching a matter that should have been shown before the

state rested, but the court exercised its discretion and allowed it to go to the jury as a part of the state's case in chief, stating to the defendant at the time that he would have a reasonable opportunity to produce such evidence as he desired in rebuttal thereof. In our opinion, the testimony was properly admissible in the first instance, Dr. Wheeler being a competent expert in the premises (*State v. Magers*, 35 Or. 520, 538, 57 Pac. 197; *State v. Knight*, 43 Me. 11; *Lindsay v. People*, 63 N. Y. 143, 158; *People v. Smith*, 106 Cal. 73, 39 Pac. 40); and the trial court exercised a proper discretion in permitting it to be given at that time, especially as it had been excluded when offered in its regular order upon the objection of the defendant. The further inquiry as to the time when decomposition would begin to take place was suitable in the development of the subject which the defense had introduced.

5. One Scott Morrill testified that he kept a place of business in Portland in January, 1900, and that on the 23d of the month there was no keno game running; the purpose being to contradict a witness produced by the defendant who gave testimony tending to show that the defendant had been lucky and won \$10 or \$12 at witness' place of business on the night of the homicide. On cross-examination it was elicited that the witness had a memorandum in which he kept an account of his winnings from night to night, and that none were shown for the night of the 23d, and, after a critical inquiry touching the memorandum, the defendant moved to strike out his testimony on the ground that he was speaking from the book, and not from his recollection. But the witness did speak from his recollection, either from being refreshed by an inspection of the book, or independently of it, when he was examined in chief, and the production of the book or memorandum was a matter called for by the defendant himself; and the fact that he spoke on cross-examination as to other matters exclusively from the memorandum constituted no valid reason for taking the evidence introduced by the state from the jury.

6. Another assignment of error goes to the introduction by the state of testimony tending to show the whereabouts of the

other members of the crew the night of the assault, with the purpose of diverting suspicion from them as perpetrators of the crime. The testimony was not intended to show an *alibi* as to the crew in particular, and thereby raise a collateral issue, but to show with greater emphasis the absence of persons other than the defendant on shipboard, whose place of abode was there, and thus increase the probability that defendant was the guilty party. The testimony was therefore admissible.

There are many assignments of error based upon instructions asked and refused, all of which we have examined with care, both with reference to the argument of counsel and authorities cited; and suffice it to say they are not attended with sufficient merit to require further discussion. All matters in controversy having been resolved in favor of the state, the judgment will be affirmed.

AFFIRMED.

Decided 3 May, 1902; rehearing denied.

WEINHARD v. COMMERCIAL NATIONAL BANK.

WILLIAMS v. SAME.

[68 Pac. 806.]

ERROR CURED BY SUBSEQUENT EVIDENCE.

1. Where, in an action for conversion of stock of a bank, plaintiff offered no testimony in his case in chief as to the value of the stock, and a nonsuit was denied, but on appeal it appeared that the bank was a going one, so that the stock must have had some value, and it appeared from the opinion of the trial court, made a part of the bill of exceptions, that much testimony was taken as to the value of the stock, any error in refusing the nonsuit will be regarded as cured.

NATIONAL BANKS—ASSESSMENT TO RESTORE IMPAIRED CAPITAL.

2. Under Section 5205, Rev. Stat. U. S. providing that every national banking association, whose capital stock shall have been become impaired, shall, after receiving notice thereof from the comptroller of the currency, pay the deficiency by a *pro rata* assessment upon the shareholders, and that if any such association shall fail to pay up its capital stock or go into liquidation, a receiver may be appointed to close up its affairs, the right to determine the course that shall be pursued rests with the shareholders, and cannot be exercised by the directors.

From Multnomah: ALFRED F. SEARS, JR., and ARTHUR L. FRAZER, Judges, in joint session.

Two separate actions were brought by Henry Weinhard and George H. Williams, respectively, to recover the value of certain shares of stock in the defendant corporation (the Commercial National Bank of Portland, Oregon,) alleged to have been wrongfully converted by it. As the same questions are involved in each case, they are here considered together. The defendant is a banking association, organized under the national bank act. On December 5, 1896, the comptroller of currency found that its capital stock had become impaired to an extent which made necessary an assessment of \$250,000, and notified the association to pay the deficiency by assessments upon its shareholders *pro rata*, and that, if not so paid, and the bank should refuse to go into liquidation, as provided by law, for three months after the receipt of the notice, a receiver would be appointed to close up its business. Upon the receipt of the notice, the directors of the bank held a meeting, and levied an assessment upon each shareholder of 50 per cent, or \$50 dollars per share, payable on or before March 11, 1897. At the time of such assessment, Weinhard owned 100 shares of the capital stock, fully paid up, of the par value of \$10,000, and Williams, 60 shares, of the par value of \$6,000, likewise fully paid up. They both refused or neglected to pay the assessment levied by the directors, and on May 5, 1897, their stock was sold at public auction, in pursuance of a resolution of the board, and the bank received on such sale the amount of the assessment. Thereafter these actions were brought to recover the value of the stock sold by the corporation, alleging it to be worth par, on the ground that the assessment was invalid, and without authority of law. The plaintiffs recovered judgment in the court below, and the bank appeals.

AFFIRMED.

For appellant there was a brief over the name of *Platt & Platt* (*Mr. E. S. Pillsbury* of counsel), with an oral argument by *Mr. Harrison G. Platt*.

For respondent there was a brief over the name of *Thomas O'Day* (*Geo. H. Durham* and *O'Day & Tarpley* of counsel),

with an oral argument by *Mr. O'Day*, *Mr. Geo. H. Durham*, and *Mr. Geo. H. Williams*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

Two questions are presented for our determination on this appeal: *first*, it is insisted that the court erred in overruling the defendant's motion for a nonsuit; and, *second*, in holding that under the national bank act the authority to levy assessments upon the shareholders of a bank for the purpose of repairing its capital stock is vested in the shareholders themselves, and not in the directors.

1. The plaintiffs offered no testimony, as part of their case in chief, tending to show the value of the stock alleged to have been converted by the defendant, and for this reason it is urged that the motion for a nonsuit was well taken. At the time of the sale the bank was a going concern, engaged in the transaction of the ordinary business of a banking association, and it may be presumed, we think, that its stock had some value, at least sufficient to entitle the plaintiffs to a nominal judgment, if their stock had been wrongfully converted. In addition to this, it appears from the opinion of the trial court, which is set out in full, and made a part of the bill of exceptions, that "much testimony was taken, and voluminous briefs have been presented by the respective counsel," upon the question as to the value of the stock; so it would seem that, if there was error in overruling the motion for a nonsuit, it was subsequently cured.

2. The other question involves a construction of the national bank act. It provides, in brief, that any number of natural persons, not less than five, may form an association for carrying on the business of banking, by executing and filing with the comptroller of the currency articles of association and an organization certificate, stating certain facts: Rev. Stat. U. S. §§ 5133, 5134, 5135. Such association thereupon becomes a body corporate, with power, among other things, to elect or appoint directors, and, by such directors, to appoint a presi-

dent, vice president, cashier, and other officers, etc.; to prescribe by-laws, regulating the manner in which its stock shall be transferred, its directors and officers elected or appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed, and to exercise all such incidental powers as shall be necessary to carry on the business of banking, etc.: Rev. Stat. U. S. § 5136. At least 50 per centum of the capital stock must be paid in before the bank can be authorized by the comptroller of the currency to commence business, and the remainder in monthly installments of at least 10 per centum, which fact shall be certified to such officer under oath: Rev. Stat. U. S. §§ 5139, 5140. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders: Rev. Stat. U. S. § 5145. The shareholders are individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of the association, to the extent of the amount of their stock therein, at its par value, in addition to the amount invested in such shares (Rev. Stat. U. S. § 5151), and no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital (Rev. Stat. U. S. § 5204). Section 5205 reads as follows: "Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the comptroller of the currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comp-

troller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four." The assessment and subsequent proceedings in this case were had under the provisions of the section quoted, and the question for our decision is whether, when the comptroller of the currency finds that the capital stock of a national bank has been impaired, by losses or otherwise, and notifies the association to make up the deficiency by assessment on its shareholders or a receiver will be appointed, such assessment is to be made by the shareholders or directors of the association.

In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued. The individual liability of the shareholders in a national bank is fixed by statute at the par value of the stock held by each, in addition to the amount invested in such shares (section 5151), and does not arise except in case of liquidation and for the purpose of winding up the affairs of the institution. There is no legal obligation on their part to pay an additional assessment necessary to repair the capital stock, unless it is voluntarily authorized by them. Their only obligation, when notice is given by the comptroller of the currency of the impairment of the capital stock of the bank, is either to assess themselves and make up the deficiency, and thus increase their investment, or to go out of business, and, we think, the law contemplates that this right shall be exercised by them alone. If they desire and elect to continue in business they must make up the deficiency; but they are, in our opinion, at liberty to take the other alternative and allow the corporation to go into liquidation. The question is a federal one, and, so far as we are advised, has never been directly passed upon by the Supreme Court of the United States. In *Delano v. Butler*, 118 U. S. 634 (7 Sup. Ct. 39), the court was called upon

to decide whether payments made upon assessments voluntarily levied by the shareholders, under Rev. Stat. U. S. § 5205, could be applied in the discharge of subsequent assessments made by the comptroller in final liquidation of the bank, under section 5151. It was held that they could not. Mr. Justice MATTHEWS' opinion proceeds on the theory that the assessment contemplated by section 5205 is one to be imposed on the shareholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing in business; while, under section 5151, the shareholders may be compelled to discharge their individual responsibility for contracts, debts, and engagements of the association. He says: "The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment of the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas, under section 5151, the individual liability does not arise, except in case of liquidation, and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the comptroller of the currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably." These remarks are, of course, not authoritative, because they were not necessary to the decision of the case; but they are, nevertheless, very persuasive, and indicate the views of the learned justice, if not the entire court.

In *Hulitt v. Bell*, 85 Fed. 98, the Circuit Court of the United States for the Southern District of Ohio, in an able and well-reasoned opinion by Judge SAGE, held that an assessment levied by a board of directors of a national bank to make up a deficiency in its capital stock, under section 5205, was invalid, and not within the power of the directors, but should have been made by the shareholders themselves. After referring to the duties and powers of the directors as provided in

the bank act, he says: "The assessment in question does not fall within any of these powers. It does not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provision for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs. The impairment of the capital may have resulted from inefficiency or incapacity or the fault or wrong of the directors under whose administration of the affairs of the bank it occurred. Their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter so vital, unless the statute gives it to them in unmistakable terms." It is argued that the opinion of the court upon this point is entitled to but little weight, because the case could have been, and was, decided upon another point. The validity of the assessment was directly involved in the case argued by counsel and considered and passed upon by the court, and, if the opinion of Judge SAGE is *dictum* at all, it should, as said by Mr. Justice CASSIDAY, in *Buchner v. Chicago, M. & N. W. Ry. Co.* 60 Wis. 264 (19 N. W. 56), "be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*." It was not a mere argument or illustration of some collateral question, but was the opinion of the court upon a litigated point in the case, and is entitled to be considered and recognized as such. The judgment of the court below will therefore be affirmed. **AFFIRMED.**

Decided 27 October, 1902.

STATE v. SALLY.

[70 Pac. 396.]

MOTION TO ACQUIT—SPECIFICATION OF REASONS.

1. Where, in a prosecution for larceny, a motion to direct a verdict of not guilty was based merely on the insufficiency of the evidence, it could not be urged for the first time on appeal that it was error to overrule the motion because there was no evidence that the taking was without the owner's consent; for, under the established practice in Oregon, a motion to acquit must specify the reasons on which it is based, unless it is for insufficiency of the evidence as a whole.

LARCENY—INSTRUCTION AS TO INTENT OF THE TAKING.

2. Where the theory of the defense on prosecution for larceny was that defendant took the animal under the belief that it belonged to his father, and that he had authority to take it, an instruction that "the intent to convert the animal to his own use, knowing it was not his, is the gist of this offense," was not prejudicially erroneous, in connection with the preceding instruction defining larceny as the felonious taking, stealing, and carrying away of the property of another, and an instruction following, exonerating defendant if the jury believed the theory of defense.

HARMLESS ERROR IN ADMITTING EVIDENCE.

3. Error in admitting testimony as to marks on a stolen article is harmless where the thing itself is before the jury.

REFUSING DUPLICATE INSTRUCTIONS.

4. A judge may properly refuse to give requested instructions that are covered by his general charge.

INSTRUCTION AS TO POSSESSION OF STOLEN PROPERTY.

5. Where the defense for larceny of a steer was that defendant took it believing it to be the property of his father, an instruction that, while possession of property recently stolen, if unexplained, is a circumstance tending to show guilt, yet if the jury believed that defendant came honestly in possession, or that it was unconnected with any suspicious circumstances of guilt, this would remove every presumption of guilt, was as favorable as defendant was entitled to; and it was not error to refuse an instruction that, if the possession was reasonably and credibly explained, the presumption of guilt arising therefrom was overcome.

PRESUMPTION FROM POSSESSION OF STOLEN PROPERTY.

6. The presumption arising from the possession of stolen property is one of fact only.

FAVORABLE ERROR IS HARMLESS.

7. Error in favor of an accused cannot be the basis of complaint, for it is manifestly harmless.

PRACTICE IN PRONOUNCING SENTENCE.

8. Whether a defendant is entitled to be asked if he has anything to say why sentence should not be pronounced, the right (if it is a right) is practically granted where the court overrules a motion for a new trial and at once pronounces sentence, for the defendant is present and has not been without a hearing.

From Baker: ROBERT EAKIN, Judge.

William Sally appeals from a judgment of guilty of the charge of larceny. AFFIRMED.

For appellant there was a brief over the names of *Geo. J. Bentley* and *Geo. A. Smith*, with an oral argument by *Mr. Bentley*.

For the state there was a brief over the name of *D. R. N. Blackburn*, Attorney General, with an oral argument by *Mr. Blackburn* and *Mr. Samuel White*, District Attorney.

MR. JUSTICE BEAN delivered the opinion.

The defendant was tried for and convicted of the crime of larceny by stealing a steer, the property of one E. H. Powers. From the judgment which followed he appeals on the ground that the court erred in overruling his motion to direct a verdict of acquittal, in the admission of testimony, and the giving and refusing of certain instructions to the jury. From the evidence it appears that on the afternoon of October 26, 1901, the defendant butchered an animal alleged by the prosecution to have been a steer belonging to Mr. Powers; that he cut the hide into four or five pieces and on the following morning put it in a water hole some 50 or 60 feet distant from his residence, where it was subsequently found by an officer of the law. The defendant admitted the killing of the animal and putting its hide into the water hole as charged, but insisted that it was a heifer, and belonged to his father, who had given him permission to kill it, and that the hide was placed in the water hole for the purpose of keeping it soft and green. Powers was called as a witness for the state, and testified, among other things, that the hide in question had his brand thereon; that he had not sold or disposed of the animal to any one, nor had he authorized the defendant, or any one else to butcher it; but he did not testify directly, nor was he asked, whether he had consented to the taking of it by the defendant.

1. At the close of the testimony for the prosecution, the defendant moved the court to direct a verdict of not guilty, for the reason that the evidence was not sufficient to justify a conviction; and it is now insisted that this motion should have been sustained, because Powers did not testify directly that the animal was taken by the defendant without his consent. The evidence on this point is perhaps sufficient, but, whether it is or not, the objection made cannot be urged for the first time on appeal. Under the practice long established, if there was a failure of proof in this particular, it should have been specified in the motion for an order to acquit. Such is the rule laid down in *State v. Tamler*, 19 Or. 528 (25 Pac. 71, 9 L. R. A. 853), where it is said: "In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which it is claimed the evidence is insufficient, unless there is a total failure of proof; otherwise the attention of the trial court will be directed to the evidence as a whole,—that is, whether there is any evidence upon which a verdict may be founded,—and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court, and perhaps subsequent research may have suggested." This same doctrine has been reaffirmed in *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797); *State v. Robinson*, 32 Or. 43 (48 Pac. 357); *State v. Fiester*, 32 Or. 254 (50 Pac. 561); *State v. Schuman*, 36 Or. 16 (58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754).

2. It is next insisted that the court erred in instructing the jury that "the intent to convert the animal to his own use, knowing that it was not his, is the gist of this offense." It is argued that this instruction is erroneous, because the defendant admitted the taking of the animal with the intent to convert it to his own use, knowing that it did not belong to him, but believing that it belonged to his father, and that he had authority and permission to take it. The instruction complained of, standing alone, might be open to some criticism; but it is a part of the general charge, and must be construed

in connection with other portions thereof. Immediately before giving this instruction, and in the same connection, the court charged the jury that larceny consists in the felonious taking, stealing, and carrying away of the property of another, and, immediately thereafter, that if they believed from the evidence that defendant killed the animal which he is charged with stealing, "honestly believing, had reason to believe, and did believe, it to be the property of William A. Sally, Senior, then the defendant would not be guilty as charged, and should be acquitted," and that it was incumbent upon the state to establish to the satisfaction of the jury, beyond a reasonable doubt, "that the defendant took the same with felonious intent, and unless such facts are established to your satisfaction, beyond a reasonable doubt, you will find the defendant not guilty." Taking the particular part of the instruction complained of in connection with the other portions referred to, it is perfectly apparent what the court intended, and what the jury must have understood, and that no injury could have resulted to the defendant therefrom.

3. The hide which it is admitted was taken from the animal killed by the defendant was produced and offered in evidence. During the trial the court permitted witnesses, over the defendant's objection, to testify as to the brand thereon, and error is based upon this ruling. If the admission of this testimony was error at all, it was harmless, because the hide was in evidence, and the jury could and did inspect it.

4. The defendant requested the court to charge the jury, among other things, that if he took the animal, honestly believing that he had a right to take it, and acted wholly upon that belief, he should be acquitted, and if he took it under a claim of right honestly entertained, and afterward discovered his mistake, a subsequently formed intent to appropriate it to his own use would not constitute the crime charged. These instructions were substantially covered by the general charge already alluded to, and there was no error in refusing to give them.

5. The defendant also requested the court to charge the jury that while the possession of property recently stolen is a circumstance which they might take into consideration as tending to show guilt, yet, if that possession is reasonably and credibly explained, the presumption of guilt arising therefrom is overcome. This was refused, but the court charged that, while the recent possession of stolen property, if unexplained, is a circumstance tending to show the guilt of the prisoner, yet, if the jury believed from the evidence that the defendant came honestly into the possession of the property, or that it is unconnected with any suspicious circumstance of guilt, this would be a satisfactory account of his possession, and would remove every presumption of guilt growing out of the same. This instruction seems, in substance, the same as that requested, and is certainly as favorable to the defendant as he could reasonably expect.

6. The presumption arising from the possession of stolen property is one of fact, and not of law. It is a circumstance in the case from which the jury may infer guilt, but no legal presumption of guilt arises therefrom: *State v. Hale*, 12 Or. 352 (7 Pac. 523).

7. The weight and value of such testimony are exclusively for the jury, and it may well be questioned whether the court, in instructing them as to what would overcome the presumption, did not invade their province (*State v. Maloney*, 27 Or. 53, 39 Pac. 398), but if so, it was an error favorable to the defendant, of which he cannot complain.

8. And finally it is asserted that the court erred in sentencing the defendant without asking him at the time whether he had anything to say why sentence should not be pronounced. At common law, it was essential in all capital offenses that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced: Wharton's Cr. Pl. (8 ed.) § 906; *Ball v. United States*, 140 U. S. 118, 129 (11 Sup. Ct. 761). But it is not believed that this rule applies to minor felonies: *Bressler v. People*, 117 Ill. 422 (8 N. E. 62); 19 Ency. Pl. &

Pr. 457. But if it does, it was substantially complied with in this case. The defendant moved for a new trial and in arrest of judgment, both of which motions were overruled at the time, or immediately prior to the sentence. This shows that he was accorded practically all that the common-law rule was intended to secure: *State v. Johnson*, 67 N. C. 55. And in the words of Mr. Justice STONE in *Spigner v. State*, 58 Ala. 421, 424: "It would look like child's play to remand this cause, when the only effect could be to propound the question to the prisoner, receive his answer that he had nothing further to offer, and then pronounce the sentence of the law on the verdict of guilty heretofore rendered by the jury, and which is free from error."

The judgment will be affirmed.

AFFIRMED.

Decided 15 April, 1901.

UNITED STATES TRUST CO. v. MARQUAM.

[64 Pac. 643.]

ABANDONED APPEAL—AFFIRMANCE*—RULES OF COURT.

Under Rule 14 of the supreme court, providing that, if the appellant abandon his appeal, the opposite party, by presenting certain parts of the record to the supreme court, may have the judgment affirmed on motion, a judgment from which an appeal has been taken may be affirmed for abandonment, on motion, where the surety on the undertaking refuses to justify within the required time, and no transcript has been filed in the supreme court.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by the United States Mortgage and Trust Co. and another against P. A. Marquam and others, in which some of the defendants partially appealed. One of the plaintiffs now moves for an affirmance of the decree for failure to prosecute the appeal.

MOTION ALLOWED.

Mr. Wallace McCamant, for the motion.

Mr. U. S. G. Marquam, contra.

*NOTE.—A second appeal was perfected in this case, and it is reported under the name of *United States Mortgage Co. v. Marquam*, later in this volume.—REPORTER.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a motion for an order affirming the decree of the court below on the ground that the appeal has been abandoned. It was taken in open court on the 20th of December, 1900, and an undertaking filed therein within the time allowed by law, with one Charles E. Hill, as surety. The sufficiency of the surety was excepted to, and he refused to justify. The appellant was thereupon given an extension of time in which to file a new undertaking, but neglected to do so, and has failed to file a transcript in this court. The respondent Title Guaranty & Trust Co., now moves for an order of affirmance, under Rule 14 of this court (35 Or. 587, 600). The appellant resists the motion on the ground that the appeal was never perfected, and therefore this court has no jurisdiction for any purpose. This position is undoubtedly sound, so far as the right to hear and determine the cause, or any questions arising therein, is concerned (*Henrichsen v. Smith*, 29 Or. 475, 42 Pac. 486, 44 Pac. 496) but it has been the practice in this state, ever since the decision in *Heatherly v. Hadley*, 2 Or. 117, for the respondent, in case of an abandoned appeal, to bring into this court certain portions of the record, and have the judgment or decree affirmed *pro forma*. Out of this practice has grown Rule 14 (35 Or. 587, 600), providing a means by which respondent may have the fact that an appeal has been abandoned made a matter of record. The present motion is within the rule, and is therefore allowed.

AFFIRMED.

Decided 26 May; rehearing denied 7 July, 1902.

GASTON v. PORTLAND.

[69 Pac. 34, 445.]

VOID SALE OF LAND CONDEMNED FOR STREETS.

1. Where an owner of property, a part of which had been condemned for a street, had been awarded damages in excess of benefits, a sale of an uncondemned part of such property for an assessment for the improvement was void.

ESTOPPEL BY ACCEPTING BENEFITS—OPENING STREETS.

2. Property had been condemned for a street, and damages awarded the owner in excess of benefits to abutting property. A part of the latter property was illegally sold for a benefit assessment, and warrants drawn in favor of the owner on the fund created by this sale and other assessments for the amount of her damages. *Held*, that the owner could accept her award out of the fund created, without impairing her remedy for the recovery of the property wrongfully sold.

EFFECT OF ERROR IN WARRANT TO PAY FOR CONDEMNED LAND.

3. Under Laws, 1898, p. 147, § 117, which provides that as soon as the appropriation to pay the assessed damages shall be in the city treasury, subject to the warrants in favor of the owners of condemned property, and the warrants drawn and ready for delivery, private property shall be deemed appropriated for street purposes, and not otherwise, an error in drawing warrants in favor of a property owner for an amount greater than that to which she was entitled did not nullify the entire proceedings, so as to prevent the appropriation of the property, as her rights had been fully protected, and she could take so much of the fund as she was entitled to.

VOID SALE FOR BENEFITS OF STREETS—DAMAGES—INJUNCTION.

4. Where a sale of property for an assessment for the opening of a street has been at the suit of the owner declared void, she cannot, in a subsequent suit to enjoin the opening of the street on the ground of illegality of the proceedings, recover her expenditures in having the sale declared void.

From Multnomah: ARTHUR L. FRAZER, Judge.

The City of Portland, intending to open Main Street, in Amos N. King's Addition thereto, from its western terminus to an intersection with King Street, a distance of 120 feet, more or less, instituted proceedings under its charter for that purpose. The plaintiff, Mary W. Gaston, is the owner of the property through which it is proposed to extend the street, and also of block No. 11, bordering and coterminus on its western boundary with the street as dedicated. The viewers appointed by the common council to assess the benefits and damages to property holders affected assessed the benefits to

plaintiff upon her property as follows: The south half of block 11, \$402; a tract lying north of and adjoining the proposed extension, \$233; and a tract lying south, \$120, aggregating \$755,—and assessed her damages at \$3,070, thus giving her damages over benefits in the sum of \$2,315. The costs attending the proceedings were found to be \$128, which, added to the damages amounted to \$3,198. The benefits assessed against the property affected, including those assessed to plaintiff, equaled this latter sum, exactly. Not being satisfied with the award of the viewers, plaintiff appealed to the circuit court, and on April 10, 1900, obtained a judgment for \$2,662.50 damages over all benefits; and, having thereby increased her award, she was entitled to costs and disbursements on the appeal, which were taxed at \$135.80. Notwithstanding the disposition made of the matter in the circuit court, a warrant was issued by the auditor on the assessment of benefits, by virtue whereof the chief of police sold the south half of block No. 11 to H. E. Noble for the amount of such assessment, which was turned into the city treasury, and went, with other collections, to make up the fund for the extension of Main Street, by which it is known in the proceedings. Of this fund there was collected and put into the treasury \$3,192.50, and on April 18, 1900, that sum was appropriated by ordinance to the payment of damages and costs, and warrants were authorized to be drawn against it in favor of the persons entitled thereto. One warrant (No. 14,239) for \$128 (being costs of the proceedings) has been drawn, leaving in the fund \$3,064.50. On August 2, 1900, the mayor and auditor drew a warrant covering the whole of the balance payable to plaintiff, and another upon the street and sewer fund for \$51.03 (being for interest), and she was notified that the same had been drawn in payment of the judgment rendered in her favor against the city, and were then in the auditor's office subject to her order. These warrants she never called for, and when the city attempted to open up the street she commenced this suit to restrain it from further

action in the premises. The trial court rendered a decree dismissing the complaint, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Seneca Smith*.

For respondent there was a brief over the names of *Joel M. Long, Ralph R. Duniway, and Bernstein & Cohen*, with an oral argument by *Mr. Duniway*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

Two questions arise: *first*, whether the plaintiff could safely and lawfully draw her award from the fund thus created by the city; and, *second*, whether the appropriation of the fund and the issuance of the warrants (they being in excess of her award) were operative and effective as the final and requisite acts under the charter to accomplish the appropriation of her land.

1. The award of the court on the appeal being for plaintiff's damages, in excess of all benefits received by her, relieved the south half of block 11 from the lien of the assessment for benefits. Henceforth the city had no claim under such lien, and the property was wrongfully sold to enforce it.

2. If \$402 be taken away from the fund remaining in the treasury, after deducting the warrant for \$128, there would remain but \$2,662.50, the exact amount of plaintiff's judgment in the circuit court, less her costs and disbursements on appeal; so that it would be insufficient to pay her demand by \$135.80. Now it is urged that plaintiff could not draw from the fund the amount of her judgment and costs, namely, \$2,798.30, without impairing her remedy for the recovery of the south half of block 11, wrongfully sold. It is plain that, if she drew the full amount of her judgment, she would absorb a part of the \$402 realized by the city from the sale of her own property, and put into the fund. Would this estop her from insisting upon the invalidity of the sale? Manifestly, the maxim *caveat emptor* applies as to Noble. He took the title at his own risk, and could have no recourse upon the city,

under whose authority the sale was made, as it could not be held as a guarantor; nor could he be subrogated in any manner to the claim of the city against plaintiff for benefits, even if it was entitled thereto: *Dowell v. City of Portland*, 13 Or. 248 (10 Pac. 308); *House v. Fowle*, 22 Or. 303 (29 Pac. 890); *Whiteaker v. Belt*, 25 Or. 490 (36 Pac. 534); *Keenan v. City of Portland*, 27 Or. 544 (38 Pac. 2). If, however, the plaintiff would estop herself from reasserting title by taking her damages, Noble would be secure from attack, and it would not matter to him that all recourse was cut off as against the city. Either the plaintiff must be permitted to refuse to accept the fund, and thereby defeat the appropriation of her property sought to be condemned, or her acceptance will not estop her to recover the property unlawfully sold. The city cannot condemn her property in one direction, and sell other of her property to create a fund to pay for that which is condemned. Such a course would result in confiscation by indirection.

The estoppel must proceed, if at all, from a ratification of the sale on the part of the plaintiff by acceptance of the purchase price, or part of it, knowing the sale to be invalid. She has done nothing to mislead the purchaser, or to cause him to pursue a different course from that which he would otherwise have done, because of which it would be inequitable to permit her to assert her rights. The city is, however, in her debt, and proffers the fund thus accumulated in payment thereof. The city its equivalent. The city is under no obligation to refund to Noble, as he has no recourse, having purchased at his own risk; and why should a disbursement of the money to plaintiff, as a creditor of the city, work a ratification of the sale in his favor? She takes nothing from Noble, either directly or indirectly, in satisfaction of anything that is her due from him, or, in any sense, in recognition of the purchase; and it is of no consequence to her from what source the fund is accumulated, as long as she does not become a *particeps criminis* to an unlawful or wrongful act herself, and so long as the purchaser takes with his eyes open, and she does nothing to induce him to part with his money, or does not enter into collusion in any way with the city whereby to raise the fund.

She is in no sense the guardian of the city, to see that it does right or proceeds legally in providing the fund by which to compensate her for property lawfully taken, and she can be accused of no wrongdoing simply because she takes of the fund provided for her payment. Nor could the city be lawfully restrained from the payment of the amount of her award under the warrants issued. They are lawful to that extent, and the payment would be lawful. We hold, therefore, that she could safely accept her award out of the fund created, without risk of ratifying the sale to Noble, or jeopardy of incurring liability for wrongdoing.

3. The second question involves a construction of section 117 of the city charter (Laws, 1898, p. 147), by which the common council is required at the expiration of the time limited for appeal, or, if taken, immediately after judgment, to make an appropriation for the amount of damages and costs assessed or adjudged, and direct warrants to be drawn on the treasury, payable out of the fund to be provided for that purpose, for the amount thereof, in favor of the owner or owners of each lot or part thereof to be condemned; and as soon thereafter as the full amount of the appropriation shall be in the city treasury, subject to such warrants, and the warrants therefor drawn and ready for delivery to the persons entitled thereto, such property shall be deemed appropriated for street purposes, and not otherwise; the appropriation to be made, the warrants drawn and ready for delivery, and the full amount of the appropriation to be in the city treasury, subject to the payment thereof, within six months after the termination of the time limited for appeal, or from the date of the rendition of judgment in the circuit court, otherwise the proceedings to become null and void. There seems to be no vague or double meaning in the language employed as to when the appropriation of the property condemned will take place, and the city be entitled to enter. The charter, *proprio vigore*, makes it at once when the conditions are fulfilled, and no other act or condition is necessary. We do not understand that the appellant questions the constitutionality of the method adopted

whereby to accomplish the purpose. She merely challenges the acts of the common council and the officers of the city as not conforming to the charter requirements, in that the appropriation and the warrants were made, and were for a larger sum than she was lawfully entitled to receive. The object of the charter is to secure the owner just compensation for property taken without his consent, and against his will and wish. It takes the place of a tender, and stands in its stead, and should be as safe and certain, and attended with no hazard, contingency, or casualty; and there must be a sure and adequate fund provided, to which the owner may resort. Payment into court of damages assessed have been held in this state to be sufficient: *Oregonian Ry. Co. v. Hill*, 9 Or. 377. This is so held because the depository is safe, and, when the money is placed therein, it is beyond the retraction of the appropriator, and nothing is left for the owner whose property has been taken but to demand and receive his compensation.

His case under the charter differs from that but slightly. The appropriation of the money must be made by the common council, the fund created, the warrant drawn, and the money actually in the fund, before the appropriation of the property for public use is accomplished. When all this is regularly attended to, there is nothing left, except for the owner to take down the amount of compensation. There would seem to be no contingency or hazard attending the matter. The city plights its faith for payment; and, not only this, it sets aside a fund, supplies it with means, and directs the owner, by warrant, to take out of it his award. We have treated of the manner in which the money was put into the treasury, and have seen that plaintiff could make no valid objections on that account. That the appropriation and the warrants were for more than plaintiff's award for damages, with costs added, and therefore for more than she was entitled to, do not conflict in any degree with the object of the charter to secure to her the compensation first assessed. It is amply secured, as she may go and take of the fund all of that to which she is entitled, and there is nothing to deter and hinder her. This be-

ing so, why does not the appropriation of her property for public use follow, notwithstanding the authorities have appropriated a larger sum, and tendered her warrants for more, than is justly due her? It is suggested that she might be enjoined from drawing the fund. This might and would, we think, be so, respecting the overplus, as she has no right whatever to that, but not as to the amount to which she is lawfully entitled; and the warrants are just as effective to enable her to draw that amount as though it was stated exactly therein. We do not think this error in making the appropriation and drawing the warrants, whether it be clerical or by misapprehension of the authorities in directing the course of the procedure, is fundamental or vitiates the proceedings *ab initio*. All of plaintiff's inherent and constitutional rights have been safeguarded by the course pursued, and the appropriation of her property was perfected by the procedure. The decree of the trial court will therefore be affirmed. . . . **AFFIRMED.**

Decided 7 July, 1902.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

4. By the petition for rehearing herein it is insisted that the city, by its unlawful act in selling the property of the appellant, caused an additional expense to her of \$100 or more, arising from the litigation made necessary in procuring the annulment of the sale. But that expense bears no relation to the present controversy. The cause of suit giving rise to it is entirely separate and distinct from this. Besides, having prevailed therein, it must be presumed that she has been justly and fully recompensed for her costs and disbursements, together with all damages sustained by the city's wrongful acts in that direction. So that there is no possible claim by which she should be reimbursed in that sum, nor does it afford any reason why the city should not prevail in this proceeding. The petition for rehearing is therefore denied.

REHEARING DENIED.

Decided 8 November; rehearing denied 8 December, 1902.

STATE v. MELDRUM.

[70 Pac. 526.]

LARCENY—POSSESSION WITH CONSENT OF OWNER—INTENT.

1. That one accused of larceny has secured possession of the property with the owner's consent is not conclusive of his innocence, but the question of his guilt will depend on the intent with which the possession was so secured, which is a matter of fact.

EVIDENCE OF FELONIOUS INTENT.

2. Evidence in a prosecution for larceny considered, and *held* to take the question whether, at the time of acquiring possession of the property with the owner's consent, defendant entertained a felonious purpose to convert it to his own use, to the jury.

SPECIAL INSTRUCTIONS SHOULD BE REQUESTED.

3. Where counsel desire an instruction covering a particular point, or given in an especial manner, it should be requested, otherwise error cannot be assigned for not giving it.

From Baker: ROBERT EAKIN, Judge.

Alexander Meldrum appeals from a conviction of larceny.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Chas. F. Hyde*, and *Mr. Geo. J. Bentley*.

For the state there was a brief and an oral argument by *Mr. D. R. N. Blackburn*, Attorney-General, and *Mr. Samuel White*, District Attorney.

MR. JUSTICE BEAN delivered the opinion.

The defendant and one Manny Howard were jointly charged by an information filed by the district attorney of the Eighth Judicial District with the crime of larceny by stealing a mare, the property of R. R. Palmer and H. E. Denham. The defendants severed on their trial. Meldrum was convicted, and appeals. The evidence against him tended to show that in the spring of 1901 he and Howard, assisted by two or three others, were engaged in gathering horses from the range a few miles from Baker City for shipment. Palmer, one of the owners of the mare alleged to have been stolen, passed them on the road,

41 880
48 100
41 380
45 353
45 572

and told them he had a mare on the range branded I C, which he asked them to keep a lookout for. This they promised to do, Meldrum saying that, if he found any of Palmer's horses down by his place, he would take them up and hold them for him, to which Palmer answered, "All right." A few days later the mare in question was found, and driven by them, with some other animals, to what is known as the "Deal Corral," about sixteen miles from Baker City, where on the following morning they changed her brand from I C to H O, by what is known as the "picking process." She was then driven with other stock to Meldrum's place, some 15 or 16 miles farther away from the range and the home of her owners. The defendants gave no information to the owners of the mare, or either of them, about their having her in their possession; but, after she had been kept at the Meldrum place about a week, Palmer heard of it, and telephoned Howard, who said, "Yes," they had the mare, asked what they should do with her, and was told to leave her in Palmer's field when he came down to Baker City the following Thursday. On the next morning, however, he and his codefendant started with a band of stock to Ontario. When Palmer learned of this, he went out to the Meldrum farm, met Meldrum just before reaching there, and told him that he had come for his mare. Meldrum said he did not think she belonged to him, because she had an H O brand. Palmer, however, went out to the field and got the mare, identifying her notwithstanding the change in the brand.

1. Assuming these facts to be true, the important question on this appeal is whether the defendant Meldrum could be legally convicted of the crime of larceny, as charged in the information filed against him. It is argued that, because the owners authorized or requested him and his codefendant to take the mare up if they found her on the range, there could have been no felonious intent in the taking, and hence no crime, whatever may have been their subsequent conduct, or whatever disposition they may have intended to make of the animal. It is familiar law that where property is delivered by the owner to another, and is received *bona fide* and in good

faith, the subsequent wrongful conversion pending possession will not support an indictment for larceny in the original taking. If, however, the property was received or taken by the defendant with a felonious intent at the time, he is guilty of larceny, even though it was by the owner's permission. This is so because a felonious intent is a necessary ingredient of every larceny, and such an intent must exist at the time of the taking. The question of its existence is one of fact for the jury, which they may infer from the words or acts of the defendant, or from the nature of the transaction: 2 Archibald, Cr. Pl. & Pr. 366; 2 Bishop, Cr. Law (7 ed.), § 864; *Hill v. State*, 57 Wis. 377 (15 N. W. 445). Thus, in *Semple's Case*, 1 Leach, 420, the prosecutor was a coach maker, who let out carriages for hire. The prisoner hired a chaise of him, at the rate of five shillings a day during the time for which he should keep it, saying that he wanted it for three or four weeks. A few days afterward he took the chaise from the owner, but never returned it, nor could any tidings be obtained of him for twelve months thereafter, when he was accidentally discovered and apprehended. On this state of facts, it was argued by the prisoner's counsel that the offense did not amount to a felony, because the prisoner had obtained legal possession of the property upon a contract, and that at most he had only been guilty of a breach of contract. But the court held that the question of the prisoner's intent in taking or receiving the chaise was a matter for the jury, saying: "It is now settled that the question of intention is for the consideration of the jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's Case*, 1 Leach, 212, and the other decisions which the judges have made upon the subject of constructive felony. If there was a *bona fide* hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite. * * But, on the other hand, if the hiring was only a pretense made use of to get the chaise out of the posses-

sion of the owner, without any intention to restore it or to pay for it, in that case the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be felony." In *Commonwealth v. James*, 1 Pick. 375, it was in evidence that the prosecutor, having a quantity of barilla which he wished to have ground, sent it to a mill kept by the prisoner. After it was ground, a mixture consisting of three fourths barilla and one fourth plaster of paris was returned, and the miller was indicted for larceny in stealing the remainder of the barilla. His counsel contended that, supposing the facts to be as the evidence on the part of the government tended to prove them, the case made out was not larceny, but only a breach of trust, or at most a fraud, with which the prisoner was not charged in the indictment. The jury were instructed, however, that if they were satisfied from the evidence that the prisoner had taken from the parcel of barilla any quantity, with a view of converting it to his own use, substituting in its place an article of inferior value in order to conceal the fraud, he was guilty of larceny. The judgment of conviction was upheld, and the conclusion reached that, "if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery was merely colorable, a taking under such circumstances would be felony."

2. It will be observed that in the cases referred to there was a manual delivery of the property by the owner to the prisoner, and the voluntary parting with the possession thereof under a contract to be performed by him, and yet in each case the defendant was held guilty of larceny if he received the property with a felonious intent. This was farther than the prosecutor was required to go in this case. Here the property alleged to have been stolen was not delivered by the owners to the defendant, nor did they voluntarily surrender possession of it to him. All they did was to request or consent that he

might take possession of it for a certain purpose. If the possession had been taken in good faith, in pursuance of such request or permission, no crime would have been committed; but, if it was actually taken with a felonious intent, defendant was guilty of larceny in so doing, notwithstanding the previous consent and permission of the owners. In short, his guilt depends upon the intent which accompanied the taking of the property, and this was a question for the jury: *Stokely v. State*, 24 Tex. App. 509 (6 S. W. 538); *Boyd v. State*, 24 Tex. App. 570 (6 S. W. 853, 5 Am. St. Rep. 908), and the other Texas cases cited by the defendant, were decided under the statutory provisions of that state (Rev. Stat. 1879, Art. 727), which materially lessens their weight as authority in other jurisdictions. Moreover, it would seem from an examination of the cases that the court there had authority to, and did, pass upon the weight of the testimony,—a right not vested in this court: *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797). Now, there was sufficient evidence in the case at bar indicating that defendant's taking of the animal was with a felonious intent to require that question to be submitted to the jury. The changing of the brand, and the manner in which it was done, immediately thereafter driving the animal 15 or 16 miles farther away from her accustomed range and the home of her owners, the failure to advise the owners that he had the animal in his possession, and defendant's statement in reference to the brand, were all suspicious circumstances, from which the jury were justified in finding a felonious intent, and we are therefore agreed that there was no error in denying the defendant's motion to direct a verdict.

Complaint is made on account of certain instructions given, and others refused. The court charged the jury, in substance, that it is not every taking and carrying away of the property of another that will constitute a larceny, but a felonious intent must be shown to have accompanied the taking, and in determining such intent they had a right to take into consideration all the testimony and circumstances bearing upon that matter. If they believed from the evidence that the owners of

the mare alleged to have been stolen authorized the defendant to take her up and hold her for them, and the defendant took her up in good faith for that purpose, and held her for the owners, he was not guilty: that if she was taken from the range by agreement or consent of the owners, in good faith, with an intent to return her to them, a subsequently conceived intention by defendant to wrongfully convert her to his own use would not constitute larceny, and he should be acquitted; but, if he took her with a felonious intent to appropriate her to his own use, he would be guilty, although the owners may have authorized or requested him to take her up for them. These instructions clearly and fairly covered the law of the case, and the verbal criticisms of the language employed are without merit.

It is also urged that the court erred in refusing certain instructions requested. But these were covered by the general charge. Instructions 1 and 3, as requested, are to the effect that if defendant took the animal alleged to have been stolen, under the authority of the owners, and held her for them, he could not be convicted, even though the brand was subsequently changed by him while the mare was in his possession, and in such case it would be the duty of the jury to disregard all evidence of the change in the brand, and acquit the defendant. The substance of both of these instructions, as far as material, was given by the trial court in the instructions already alluded to; and, moreover, there was no error in the court's refusal to give them as requested, as both omitted any reference to the intent with which the animal was taken.

3. There was no request in this, as in the Howard Case (*State v. Howard*, 41 Or. 49, 69 Pac. 50), to instruct that, if possession of the animal was taken with no intention at the time of stealing it, it would be immaterial whether or not the defendant subsequently changed the brand. In the absence of such a request, it was not error for the court to neglect to give an instruction to that effect. If the defendant desired that phase of the case presented to the jury, it was his duty to

so request, and, not having done so, he is not entitled to base any assignment of error on that ground. The judgment of the court below is affirmed. **AFFIRMED.**

Decided 26 May; rehearing denied 7 July, 1902.

NODINE v. FIRST NATIONAL BANK.

[68 Pac. 1109.]

WHEN ACCOUNTS BECOME STATED—QUESTION FOR THE JUDGE.

1. An account rendered and delivered to the debtor, which exhibits the creditor's demand, becomes an account stated, as between them, unless objected to within a reasonable time; and where the facts are undisputed, the question of what is a reasonable time is for the court.

EXTENT OF APPLICABILITY OF SUCH RULE—BANKS.

2. The rule as to what constitutes a stated account has now become applicable to almost all classes of debtor and creditor transactions.

BANKS AND DEPOSITORS—ACCOUNTS STATED.

3. The relation between a bank and its depositors is that of debtor and creditor, and the same rules apply regarding the rendering and stating of accounts as between merchants.

EVIDENCE OF STATING AN ACCOUNT.

4. The first time plaintiff's pass book was written up after he opened an account with defendant bank he objected that he had not been credited with certain items. The bank denied that he was entitled to such credits, or any credits not on the book. He continued to deposit with and draw checks on the bank for ten years thereafter. From month to month the bank wrote up and delivered to him the pass book showing the condition of the account, and no objection thereto was made except to the first statement. When their business ceased, the book was written up, showing a small balance to plaintiff's credit, and this statement was not objected to for about six years. *Held*, that plaintiff's receipt and retention of such statements of the account without objecting thereto within a reasonable time constituted an account stated.

PLEADING A STATED ACCOUNT—AIDED BY VERDICT.

5. Where, in an action against a bank, the answer alleged that from time to time defendant rendered to plaintiff itemized statements of the account, and that he made no objection thereto, but acquiesced therein, and to each and every item thereof, and states the balance shown by such statements, such allegations are sufficient, after verdict, as allegations of an account stated.

From Union: W. R. ELLIS, Judge.

This is an action by Fred Nodine against the First National Bank of Union to recover an alleged balance due plaintiff from the defendant bank. The complaint avers, in substance, that

the defendant corporation was organized in May, 1883; that prior thereto plaintiff had on deposit with the Bank of Union the sum of \$27,000, which was transferred by that bank to the defendant corporation at the time of its organization; that from time to time thereafter, and until September 5, 1899, plaintiff deposited money with the defendant, amounting in the aggregate to the sum of \$125,000; that on the latter date there was in the hands of the defendant of the moneys so desposited by the plaintiff and due to him a balance of \$17,213.78, for which he drew his check, but defendant refused to pay the same, or any part thereof, except the sum of \$4.82, which sum defendant acknowledges is due plaintiff.

The answer denies the material allegations of the complaint, and sets up as a defense: (1) That on July 9, 1883, the plaintiff opened an account with the defendant bank, and from that time to the 1st day of September, 1894, deposited with it from time to time, subject to call and check, in the aggregate, about the sum of \$165,703.50, and during such time issued his checks to various and sundry persons on the defendant bank and against such deposits, which checks were presented to and paid by the bank, in the aggregate amounting to the sum of \$165,698.68, leaving a balance due the plaintiff of \$4.82; (2) that from time to time defendant rendered to plaintiff itemized statements of account, showing the true balances, and that plaintiff made no objection thereto, but acquiesced therein, and to each and every item thereof, by reason of which the plaintiff and defendant from time to time had an accounting and settlement between them of all matters of account set out in the plaintiff's complaint, and that upon such accounting and settlement there was found stated, settled, and agreed upon as due and owing from defendant to plaintiff a balance of \$4.82, and no more, on the 1st day of September, 1894; (3) that all of the deposits of money made by plaintiff with defendant, and all of the matters and things set out in the complaint, including the deposits, and amounts drawn therefrom, occurred between July 9, 1883, and September 1, 1894, at which latter date the account was closed, and therefore the

alleged cause of action did not accrue within six years immediately preceeding the commencement of the action.

The reply puts in issue some of the affirmative allegations of the answer, but admits the rendition by defendant to plaintiff of statements of account from time to time, and alleges that in July, 1883, at the time the first statement of account was rendered, the plaintiff objected thereto for the reason that he was not credited therein with large sums of money he had deposited with the defendant, and then and there demanded that defendant make such credits, which it neglected and refused to do; that plaintiff thereafter repeatedly asked defendant for credit for such sums, without avail, and that plaintiff had never acquiesced in the statements furnished him by the defendant, nor assented to the same, nor agreed to the balance, or to any balance; that the items for which he claims such credit make up and constitute the sum for which he asks judgment in this action. Upon the issues thus joined a trial was had before a jury, resulting in a judgment and verdict in favor of the plaintiff for the sum of \$8,091.90, from which the defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thos. H. Crawford*, and *Mr. C. E. Cochran*.

For respondent there was a brief over the names of *Baker & Baker*, and *J. D. Slater*, with an oral argument by *Mr. J. F. Baker*, and *Mr. Slater*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The record contains numerous assignments of error, but we do not deem it necessary to notice them in detail. The amount plaintiff seeks to recover in this action, as shown by the pleadings and testimony, consists of money alleged to have been deposited with defendant to his credit by third persons prior to September, 1883, for which, as he contends, he never received the proper credit. The evidence shows that from 1883 to 1893

he continued to do business with the bank, his deposits during that time amounting to more than \$165,000. Beginning with September 29, 1883, the bank rendered to him at frequent intervals, and generally from month to month, itemized statements of his account, showing in detail the balance carried over from previous statements, together with all credits and debits. The last one of these statements was rendered on September 1, 1894, more than six years before the commencement of this action, and showed a balance due plaintiff at that time of \$4.82. No objection was ever made by him to these accounts, or any of them, except, as he testifies, that when the first one was rendered in September, 1883, he insisted that the bank had failed to give him credit for certain moneys paid to it on his account; but the officers of the bank contended that he was mistaken, and that all proper credits had been given, and refused to make any change in the account. From this time on for the succeeding ten years the plaintiff continued to do business with the bank, and it continued to render him monthly or bimonthly statements of his account, which were received and retained by him without objection. On this state of facts the defendant requested the court to charge the jury, in substance, that the accounts so rendered, and especially the one of September, 1894, constituted an account stated, and a bar to the action. This instruction was refused, but the court advised the jury if they found from the evidence that plaintiff failed to make any objections to the statements for an unreasonable length of time after they were delivered to him, they would become stated accounts, if they further found that such statements were made six years or more prior to the commencement of the action.

1. This court has had occasion in many instances to consider the question of an account stated, and it must now be regarded as settled that an account rendered and delivered to the debtor, which exhibits the creditor's demand, becomes, as between them, an account stated, unless objected to within a reasonable time; and where, as in this case, the facts are undisputed, the question as to what constitutes a reasonable time

is one of law for the court, and not of fact for the jury: *Crawford v. Hutchinson*, 38 Or. 578 (56 Pac. 84).

2. At one time this rule applied to accounts between merchants only, but it has now become so extended as to embrace practically every kind of transaction involving the relation of debtor and creditor, and applies to a bank and its customer or depositor.

3. The relation of a bank and its depositor is that of an ordinary debtor and creditor, except that by custom the bank is only liable upon demand made at its place of business. In other respects the dealings between a bank and its customer are governed by the same rules as those between other debtors and creditors. When the pass book of a depositor is written up and delivered to him, or the bank renders him an itemized statement of his account, and he retains the same without objecting thereto within a reasonable time, it constitutes an account stated: 1 Am. & Eng. Ency. Law (2 ed.), 449, note; *Leather Mfrs' Bank v. Morgan*, 117 U. S. 96 (6 Sup. Ct. 657); *Clark v. Mechanics' Nat. Bank*, 11 Daly, 239; *Benton County Bank v. Walker*, 85 Iowa, 728 (51 N. W. 241); *Hardy v. Chesapeake Bank*, 51 Md. 562 (34 Am. Rep. 325).

4. The plaintiff retained the account rendered to him in September, 1894, for almost, if not quite, six years, without objecting thereto, and under the law it became an account stated, and a complete defense to this action, unless impeached by fraud or mistake. The statute of limitations seems to have been confused in the instructions with an account stated. An account rendered becomes an account stated if not objected to within a reasonable time, and this is a matter wholly distinct from the statute of limitations.

5. The contention is made that the answer does not contain a sufficient plea of an account stated. But, whatever might be said of it if the question were here on a demurrer to the answer, it is manifestly sufficient after verdict. It follows from these views that the judgment must be reversed, and the cause remanded for a new trial.

REVERSED.

Decided 8 June, 1902; rehearing denied.

UNITED STATES MORTGAGE CO. v. MARQUAM.

[69 Pac. 37, 41.]

CONCLUSIVENESS OF FINDINGS WHERE EVIDENCE IS NOT BROUGHT UP.

1. A finding of the trial court that a trustee, empowered by a trust deed executed by a mortgagor to take possession of the mortgaged property, and to collect the rents and profits, and apply them to the payment of interest and taxes, was not the agent of the mortgagee, is conclusive on appeal, where the evidence is not brought up.

POSTPONEMENT OR FORFEITURE OF MORTGAGE LIEN.

2. A mortgagor on the date of the mortgage deeded the property covered thereby, together with certain other property, to a trustee; the latter to take possession and collect the rents and profits, and apply them to the payment of interest and taxes, etc. The trustee was further empowered to lease the property, and to extend the term beyond the maturity of the mortgage, not exceeding one year. The court found that the trustee made two leases extending beyond the maturity of the mortgage, neither of which was at the instance of the mortgagee. *Held* insufficient to postpone or forfeit the mortgage lien.

USURY—STATUTORY CONSTRUCTION.

3. Under Section 3593 of Hill's Ann. Laws, providing that contracts made in this state on which the rate of interest is 8 per cent or less, whereby one party shall agree to pay the taxes on the debt, credit or mortgage, shall not be usurious, parties may lawfully contract to pay the taxes, and any or all other charges or rates that may be mutually agreed upon, provided all such charges and the interest together, exclusive of the taxes, do not exceed 8 per cent.

PLEADING—FACTS—CONCLUSIONS.

4. A mortgagor on the date of the mortgage deeded the property covered thereby, together with certain other property, to a trustee; the latter to take possession and collect the rents and profits, and apply them to the payment of interest and taxes, etc. The trustee was further empowered to lease the property, and to extend the term beyond the maturity of the mortgage, not exceeding one year. *Held*, that an answer in a suit to foreclose the mortgage, showing that some five leases were executed beyond the time designated, but not showing what rents were stipulated for, or how they were injurious to the mortgagor's reversionary estate, but merely averring that the leases were apparent incumbrances and clouds on the mortgagor's title, was insufficient to show an estoppel, or to require a forfeiture of the mortgage lien.

FRAUDULENT MORTGAGE—VALIDITY OF AS BETWEEN THE PARTIES.

5. An objection that a mortgage and deed of trust executed by a party is a fraud on his creditors is available only to the latter, and cannot be made by the party himself, it appearing that the instruments themselves had a good consideration.

TERMINATION OF MORTGAGE TRUST—RIGHTS OF TRUSTEE.

6. A mortgagor on the date of the mortgage deeded the property covered thereby to a trustee, the latter to take possession and collect the rents and profits, and apply them to interest, taxes, etc. The deed obligated the trustee to make certain advances for the benefit of the mortgagor. The life of the

trust was made dependent on the existence of the mortgage, and the trustee was given a lien for advances made. *Held*, that foreclosure of the mortgage terminated the trust, and, where made a party defendant to the foreclosure suit, the trustee was entitled to file a cross complaint seeking to have its own lien foreclosed.

CONSTRUCTION OF MORTGAGE TRUST AGREEMENT.

7. The trust contract and agreement executed between the trustee and the defendants herein did not require the trustee to make advancements to pay interest on the mortgage loan.

FORECLOSURE OF LIEN—RELIEF ON CROSS SUIT.

8. A cross complaint brought against a mortgagor by one of the parties defendant to a suit to foreclose the mortgage may extend to all the property covered by the cross complainant's lien, and need not be confined to the property covered by the original mortgage, for such an answer is really a suit to foreclose such lien, and the party should not be obliged to assert his rights by piecemeal.

EXECUTION SALE—OBJECTION—NOT MADE BEFORE TRIAL COURT.

9. An objection that there was not sufficient proof of the publication of a notice of sale on execution could not be taken for the first time on appeal from a decree confirming the sale, but should have been raised in the trial court.

EXECUTION SALE—EVIDENCE OF BEING A SUNDAY PAPER.

10. A paper denominated the "Sunday Welcome," issued on Saturday of each week between 1 and 4 o'clock in the afternoon, and delivered to subscribers on that day, notwithstanding its name, is not a Sunday publication in a legal sense.

TERM "NEWSPAPER" CONSIDERED.

11. A weekly paper having a circulation through the mails, by delivery and by news stands of from 1,000 to 1,100 copies and not confined to any particular class or sect of individuals, sensational in its tone, containing the sporting news, some news of general interest, and many advertisements of a business nature, is a newspaper within the purview of Hill's Ann. Laws § 291, requiring notice of an execution sale to be published in some "newspaper."

EXECUTION SALE—SUFFICIENCY OF SHERIFF'S RETURN.

12. A sheriff's return on an execution reciting, "I further certify that I advertised said sale also by posting copies of the said notice in three public places in the county of M. and State of Oregon," etc., was sufficient, and an objection that it did not set forth facts showing that the places where the notices were posted were public places was untenable.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit by the United States Mortgage & Trust Co. to foreclose a mortgage given by P. A. Marquam and wife, and the defendant Title Guarantee & Trust Co. filed a cross bill asking the foreclosure of a trust deed given as security for sundry loans. There was a decree in favor of the plaintiff and

the cross-plaintiff, from which the defendants Marquam appeal. The mortgaged property having been sold, objections were filed to the confirmation of the sale, and from an order overruling them the defendants Marquam again appeal. The facts are fully stated in the opinions, which are both written by Mr. Justice WOLVERTON, and are reported together.

On November 13, 1894, P. A. Marquam and Emma Marquam, his wife, executed and delivered to plaintiff, the United States Mortgage & Trust Co. a mortgage on certain real property to secure the payment of \$300,000 in five years from date, with interest at 7 per cent per annum, payable quarterly. There is a stipulation in the mortgage that, in case of default in payment of interest or in complying with the conditions thereof, and as often as there was a failure in either respect, the mortgagee might at any time declare the whole of the principal due, and foreclose at once. The quarterly interest due in February, May, and August, 1899, being defaulted, shortly prior to November 13th following, the date upon which the principal sum was made payable, the mortgage company commenced this suit to foreclose. The Title Guarantee & Trust Co. was made a party defendant, with numerous others having or claiming interests in the premises mortgaged. On the date of the execution of the mortgage Marquam and wife and the Title Company entered into a trust agreement with relation to the property mortgaged, together with four lots in block 120, in the City of Portland, all of which was conveyed to the Title Company, which recites, in brief that *whereas*, in consideration of the premises and of the agreements on the part of Marquam and wife, hereinafter contained and herefore understood between the parties hereto, said Title Company has rendered certain services, and will advance certain sums of money, and has secured for Marquam and wife a loan in the sum of \$300,000 from the Mortgage Company, to secure the payment of which they have executed their mortgage on certain real property (describing it): Now, therefore, it is mutually agreed that Marquam and wife will pay the Title Com-

pany the sum of \$4,500 for exchange, title insurance, abstract of title, and brokerage in the matter of said loan, and during the life of said trust will pay said Title Company for its services rendered in the financial management and oversight of said property \$1,000 per annum and certain specified commissions; and it is further agreed that during the life of said trust the Title Company shall have the entire control and management of said property for the use and purposes hereinafter set out; and *whereas*, under a certain preliminary agreement entered into between Marquam and wife and the Title Company and others on the 30th of August, 1894, the Title Company agreed to advance for Marquam, when said loan of \$300,000 should be consummated, the funds in excess of said loan necessary to discharge certain specified indebtedness and expenses; and *whereas*, it may be necessary in the matter of said trust for said Title Company to advance money from time to time to Marquam and wife,—it is further mutually agreed that when any of such advances are made they shall execute their promissory note for each sum advanced, to become due and payable on or before two years, unless they would mature at a date subsequent to the maturity of the mortgage, in which event they should be so drawn as to fall due contemporaneously with said mortgage; that the lots in block 120 should be held in trust as collateral security, and the remainder of the property in trust to carry out the purposes of this agreement, and to collect the rents and profits arising therefrom for the following purposes: (1) To pay operating expenses, repairs, for services in collecting rents, interest on loan, taxes, and public charges; (2) to pay all amounts advanced and to be advanced to Marquam and wife; (3) to pay certain other indebtedness specified; (4) to pay the Title Company for services in executing the trust; and (5) after said loan shall be discharged, and all requirements of the trust satisfied, to reconvey the property.

On February 13, 1895, the parties entered into a supplemental agreement, whereby the original is so construed as to authorize the Title Company to execute leases to any and all

of said property, and, where necessary to secure desirable tenants, to extend the time beyond the life of the trust, not exceeding one year, having due regard for Marquam's interest after the life of said trust as to the amount of the rentals, and not to collect beyond the life of the trust in advance. Still another agreement was entered into with reference to the trust property, to which the Northern Counties Investment Co. became a party, but it is not important within the range of the present controversy. On December 1, 1899, Marquam and wife filed an answer in abatement denying the mortgagee's authority to declare the whole of the principal sum due for the nonpayment of interest charges, and setting up that the Title Company was the agent of the plaintiff, and that as a part consideration for said loan, and as an essential condition thereof, the agreement was entered into between Marquam and wife and the Title Company as hereinafter set forth; that said Title Company has collected sufficient funds with which to discharge the unpaid interest notes, over and above the expenses and cost of management of the property, but has misapplied and misappropriated them in violation of said trust, and that by neglect of duty it has failed to obtain and collect a large sum of rentals it could and should have collected by the exercise of proper diligence and oversight, and that an accounting is necessary to a proper determination of the matter. And for a further defense it is alleged that the Title Company, while acting as such trustee for the Mortgage Company, and at its instance and with its approval, but without consent of Marquam and wife, made divers leases of divers parcels of real property extending beyond the 13th of November, 1899,—all of which were in violation of the conditions of the trust; that such leases were incumbrances and clouds upon the title to said realty; and that any sale under foreclosure during the period in which any of said leases have to run will cause Marquam and wife irreparable loss and injury, and pray for a dismissal of the suit.

A trial being had under issues tendered by a denial of all the material allegations of the answer, it was found, among

other things, that the trust agreement was not a part of the contract with the Mortgage Company for the loan of \$300,000, and that the Mortgage Company was not a party thereto; that the Title Company was not the agent of the Mortgage Company in any sense in so far as it related to the trust agreement, nor has it collected rents and profits sufficient with which to meet said interest payments, over and above costs and expense of operating and managing the property; that it made the leases complained of at its own instance, without the approval of the defendants Marquam and wife, and that the Mortgage Company as mortgagee did not consent to the making of more than two of them; and thereupon dismissed the plea.

Later, Marquam and wife answered the complaint, again alleging that the trust agreement was entered into as a part consideration for the loan made by the Mortgage Company, and that its execution was an essential condition precedent to the making of said loan; that for a long time prior to the date of said mortgage and trust agreement the Title Company had been and was the agent for the Mortgage Company for making loans and the investment of its funds in and about the City of Portland and collecting and remitting interest under an agreement that the Title Company should charge and collect from the parties to whom money had been loaned by the Mortgage Company a reasonable compensation for its services in making such loans, and collecting and making remittances in the form of brokerage, and thereby wholly relieve the Mortgage Company from such expense; that the loan to Marquam and wife was made in pursuance of such agreement, and that said trust agreement was entered into for the benefit of said Mortgage Company, to enable it to collect and have remitted its interest and principal sum, whereby the brokerage and commissions for such services were to be paid by Marquam and wife; that the said Title Company, while in possession of the property under said trust, has received and retained to its own use commissions amounting to the sum of \$3,000, and claims brokerage and salary in the further sum of \$2,000,

adding which to the stipulated interest of 7 per cent would make the rate unlawful and usurious; and that the loan is therefore void, and the principal sum should be forfeited to the school fund. For a second defense it is alleged, as in the plea in abatement, that leases have been made extending beyond the date of the maturity of the mortgage at the instance and by and with the consent of the mortgagee to the end that it might realize more than it was entitled to from the rents, issues, and profits of the property, and without the consent of Marquam and wife, whereby their title had been clouded and irreparably damaged, and the lien of plaintiff's mortgage waived, and it is estopped from foreclosing the same. For a third defense it is alleged that the property conveyed in trust to the Title Company was substantially all the property that Marquam and wife owned at the time; that Marquam was then indebted to divers persons other than the plaintiff and the Title Company in the sum of more than \$70,000, and the conveyances operated to harass and hinder them in the collection of their demands, and that such was the intent and purpose of the trust agreement and the Mortgage Company in instigating it; and that such mortgage and trust agreement was, in effect, an assignment for the benefit of a part, only, of Marquam's creditors, and was therefore illegal and void. For a counterclaim it is alleged that the Title Company, acting as the agent of the Mortgage Company, has collected large sums of money, which it has wrongfully and negligently failed to apply towards the payment of said interest notes, and has converted the same to its own use in the aggregate of over \$50,000; and that an accounting is necessary for the ascertainment of the true amount thereof, and a dismissal of the suit is demanded.

The answer was held to be insufficient in every particular tested by motion and demurrer directed to specific parts and to the whole thereof. On November 6, 1899, the Title Company filed a cross complaint setting up its trust agreement with Marquam and wife, the subsequent modification, and its operations and doings thereunder; that it has made

large advances to Marquam and wife from time to time, and taken their notes therefor; and has made further advances for which notes have not been given, and has rendered to them from time to time statements of account, which were approved and have been settled, and that at the date of the filing of said cross complaint there was due and owing from Marquam and wife to the Title Company a large sum of money amounting to \$40,897.81, with accrued interest.

Marquam and wife answered again, setting up the trust agreement, and alleging that the requirements of the trust have not been fully satisfied; that it has not yet terminated; that by the terms thereof the Title Company was obligated to make further advances and to perform further services, and that the trust must yet continue for an indefinite period. The second defense is akin to this, and avers that the Title Company is now in possession of the property, assuming and pretending to be engaged in the performance of its duties under the trust. By the third it is alleged that the Title Company has been negligent in its duty in leasing the property, to the damage of Marquam and wife in the sum of \$90,000; and a fourth defense is of like tenor, alleging damages in the sum of \$36,000, arising from the same cause. A fifth defense alleges that the Title Company failed to pay the taxes or to make advances to Marquam and wife as it had agreed, whereby they are damaged in the further sum of \$50,000, and it was sought to have the cross complaint dismissed, or an accounting had before the trust should be wound up. The first and second defenses were held insufficient upon demurrer, and other parts of the answer were stricken out on motion. After trial upon the merits under the remaining issues between Marquam and wife and the Title Company, the court found, among other findings of fact, that the Title Company, upon the execution of the first agreement with the Marquams entered into possession of the trust property, and has since controlled and managed it; that from time to time and frequently during the supervision thereof, and as late as January 13, 1899, the Title Company rendered them statements of

account, whereby it fully disclosed and truly stated the matters of account between them arising from said trust; that no objections were ever made thereto prior to the month of July, 1899, and that on the 13th day of May, 1900, there was then due the Title Company \$28,667, exclusive of attorney's fees; that the Title Company has been prudent, careful, and diligent in renting the various properties, and in the conduct and management of said trust, and has been guilty of none of the acts of negligence, carelessness, or maleficence specified in the answer of defendants. By the final decree it was considered that the trust agreement had been fully carried out and completed; that it was, in effect, a mortgage, and constituted the company a mortgagee in possession, and a foreclosure decreed; and the assets to arise from a sale under execution were marshaled with reference to the relative equities of the plaintiff and the several parties defendants. Marquam and wife appeal.

AFFIRMED.

For appellants there was a brief over the names of *U. S. Grant Marquam*, and *Watson & Beekman*, with an oral argument by *Mr. Edw. B. Watson*, and *Mr. Marquam*.

For Title Guarantee & Trust Co., and *J. Thorburn Ross*, Trustee, there was a brief over the name of *Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. We will consider the numerous questions presented as they appear to arise upon the record. It is first urged that the Title Company was the agent of the mortgagee under the trust agreement for the collection of rents and profits and their application to the payment of taxes and interest, and that, such agent having collected sufficient of the rents to discharge the interest notes, the suit was prematurely instituted. These are matters of fact, and were disposed of under the plea in abatement, and, as the evidence has not been brought up, the findings of the trial court are conclusive.

2. In this connection there was another question presented relating to the leasing of divers parcels of realty to continue beyond the maturity of the mortgage, whereby it is claimed that the lien of the plaintiff acquired by virtue of the mortgage has been waived and forfeited, or at least postponed until all damages arising from said unauthorized leasing are made good. The court found, however, that the Title Company had made two leases, only, extending beyond the maturity of said mortgage, neither of which was at the instance of the Mortgage Company. This was not effective to postpone or forfeit the plaintiff's mortgage lien. Plaintiff's action in relation thereto, as so found, cannot be construed to extend beyond the bare assent of a mortgagee to the leasing. It was not an affirmative impairment upon its part of the value of the mortgaged property, and such was not its purpose by any inference that can be drawn from the transaction.

3. The next question presented by appellants is that the loan was usurious. This contention is necessarily based upon the hypothesis that the Title Company was the agent of the lender in the control and management of the trust property and the collection of the rents, issues, and profits, for which services it charged and received a commission from Marquam and wife. Such relation, however, was found not to exist under the plea in abatement; but, even if it did, the contract is not shown to be usurious. The statute (Hill's Ann. Laws, § 3593,) provides that all contracts made or entered into in this state on which the rate of interest is 8 per cent or under, whereby one party shall agree to pay the taxes on the debt, credit, or mortgage, shall not be deemed or taken to be usurious; and the argument is that any contract to pay anything beyond the rate agreed upon, however small, with taxes, although such rate is under 8 per cent, is usurious; that is to say, as applied to the case at bar, the parties having agreed upon 7 per cent, with taxes added, any further charge for the use of the money in addition to the agreed rate would render the contract invalid, whether it was made thereby to exceed 8 per cent or not. This is neither the spirit nor the intend-

ment of the statute. Parties are permitted to contract for interest as high as 8 per cent, with taxes added; and if all rates, charges, or other compensation agreed upon for the use of the money do not exceed the rate, aside from the taxes on the debt or obligation, the transaction does not fall within the interdiction of the law, and is, therefore, not usurious. Now, it is alleged that the Mortgage Company charged commissions for collecting rents, etc., during a period of five years, amounting to \$3,000, and claim brokerage and salary, covering the same period, of \$9,000, aggregating \$12,000, or \$2,400 per annum. At 8 per cent, the interest charge would be \$24,000 per annum on the amount of the loan, but the rate agreed upon was 7 per cent, or \$21,000, per annum, thus leaving a margin of \$3,000, which exceeds the alleged additional charges and commissions; so that, conceding the allegations of Marquam and wife to be true,—as we must where the pleadings are tested by demurrer,—usury has not been established.

4. The second separate defense proceeds upon the idea that the plaintiff has forfeited its mortgage lien, and is estopped to insist upon its foreclosure, by reason of having been instrumental in the execution of the unauthorized leases of parcels of realty. It appears by the answer that some five leases were executed extending beyond the time designated in the supplemental trust agreement, which permitted the trustee to execute them for one year beyond the maturity of such mortgage. It is not shown, however, what rents were stipulated for, or in what respect they were injurious to Marquam's reversionary estate, and the statement that the leases are apparent incumbrances and clouds upon Marquam's title is a mere conclusion of law; so that the facts pleaded are wholly insufficient to create an estoppel, much less to require a forfeiture of the Mortgage Company's lien.

5. It is next urged that by the mortgage and deed of trust Marquam and wife transferred substantially all their property to the mortgage and title companies, which operated as a hindrance and fraud upon divers other of their creditors, and was

so intended by the parties concerned, and that the mortgage is void on that account. Giving to the allegations of the answer their strongest interpretation in favor of the pleader, the transaction, being founded upon a consideration, was voidable only at the instance of the creditors, but valid as between the parties to the contract, and enforceable in equity: *Bradtfeldt v. Cooke*, 27 Or. 194 (40 Pac. 1, 50 Am. St. Rep. 701). The plea is therefore unavailable, as held by the trial court.

The last defense interposed to the complaint is that the Title Company, as plaintiff's agent, collected the rents and profits of the property deeded in trust, which it failed and neglected to apply in discharge of the interest notes, and converted the same to its own use, and that an accounting is necessary to a determination of the amount thus collected. If it be conceded that the answer is technically sufficient, the issue was tried out between Marquam and wife and the Title Company, and after a full hearing it was found that the company had conducted and managed said trust carefully and honestly, and had punctiliously accounted for all sums collected and received by virtue thereof. This, in effect, disposed of all the matters in controversy on the merits, and the court of equity would not be warranted in reversing the decree of the trial court upon a purely technical objection, which could not result in any different adjudication in the end.

6. It is next urged that the Title Company could have no relief by cross complaint, because the trust agreement had not terminated, either by performance or by rescission, and that no final accounting could be had, nor a lien decreed against the property in favor of the trustee, until one or the other of these conditions existed. The trust agreement, as shown by its terms and conditions, was entered into to enable the Title Company to manage the property, and from the rents and profits arising therefrom to discharge the expenses of management and interest charges on the mortgage so far as they were sufficient, and, if there was a surplus, to apply it *pro rata* to certain specified indebtedness of Marquam and wife, and after these to apply it on the principal sum for which the

mortgage was given. The life of the trust was made dependent upon the existence of the mortgage, and the Title Company was given a lien for advances made in pursuance of the stipulations contained in the trust agreement, so that a foreclosure of the mortgage would necessarily put an end to the trust relations. Regardless of any stipulations of the parties, such foreclosure would deprive the trustee of the subject of the trust to operate upon, and the agreement would henceforth become inoperative. It was, therefore, incumbent upon the Title Company, when made a party, to answer, setting up its duties and obligations in the premises, as well as its rights and interest in the property; and having a lien, whether it comes by a trust agreement, technically speaking, or an instrument more properly denominated a mortgage, it has as good a right to have it foreclosed as if it were plaintiff in the suit: Hill's Ann. Laws, § 416.

7. The agreement is not susceptible of the construction that the Title Company undertook to advance the money necessary to meet the interest payments upon the mortgage loan as they came due. There is a recital in the agreement that it may become necessary in the matter of the trust for the Title Company to advance moneys to Marquam and wife, but we look in vain throughout its terms and conditions for any stipulation to advance the interest on the loan as it became due, or to pay it otherwise than out of the funds collected and realized from the rents and profits. Other advances are specifically mentioned, and the agreement by the most liberal construction, cannot be extended so as to include interest payments. So the Title Company was not remiss in failing to make advances of interest to prevent the mortgagee from declaring the mortgage due before the date of its maturity.

8. It is no answer to the cross complaint of the Title Company to say that it is now engaged in the performance of its obligations under the instrument, because the institution of the suit to foreclose the mortgage necessarily required the winding up of the trust affairs, and hence it is perfectly legitimate to insist upon an accounting with reference thereto at

the present time. This disposes also of the second defense to the cross complaint. In this connection it is contended that the Title Company cannot foreclose as to the lots in block 120, as they are not covered by plaintiff's mortgage, and not the subject of its foreclosure proceedings. These lots were hypothecated, however, by the same instrument, to secure the same obligations to the Title Company, as the property covered by plaintiff's mortgage, and is as much subject to a foreclosure at the suit of the Title Company as the other premises. A cross complaint of a defendant having a lien is, for all purposes, a complaint against the holder of the equity of redemption (*Ludd v. Mason*, 10 Or. 317), and may also extend to all property covered by his lien, and thus he may have full relief at once, and not be driven to a foreclosure by piecemeal: *Phillips v. Anthony*, 47 S. C. 460 (25 S. E. 294); and *Stockton Sav. & Loan Soc. v. Harrold*, 127 Cal. 612 (60 Pac. 165).

The matter of damages appears, as we have seen, to have been disposed of upon the merits, notwithstanding certain alleged items may have been stricken out of the motion, and concludes further controversy as to them. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Decided 3 June, 1902.

ON SUPPLEMENTAL APPEAL FROM AN ORDER.
CONFIRMING A SALE.

Messrs. Edward B. Watson and U. S. Grant Marquam, for the objections.

Mr. Wallace McCamant, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

9. This is an appeal from a decree confirming the sale of real property under execution. The first objection insisted upon is that there is not sufficient proof of the publication of the notice of sale, there being no affidavit of the printer of the

newspaper, his foreman, or principal clerk annexed to the sheriff's return showing the publication. But this question was not raised in the trial court, and hence no error is assignable respecting it. It is not a question like want of jurisdiction, or insufficiency of facts to constitute a cause of suit, that may be raised at any stage of the proceeding, but must be interposed at the proper time in the trial court; otherwise it cannot be urged in this court for the first time. Such is the rule in actions at law (*State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169, 8 Pac. 327), and there exists no good or sufficient reason why it should not prevail in equity.

10. It is next contended that the Sunday Welcome is not a newspaper, within the purview and meaning of Hill's Ann. Laws, § 291, because it is a Sunday paper, and not of general circulation. The paper, as shown by the evidence, is issued on Saturday of each week, from 1 to 4 o'clock in the afternoon, bears date and is mailed and delivered to subscribers on that day, so that, whatever may be its name, it is clear that its issuance and circulation takes place on a secular day, and not on Sunday: 16 Am. & Eng. Ency. Law (1 ed.), 491; *Pratt v. Tinkcom*, 21 Minn. 142. The Sunday Welcome is therefore not a Sunday publication in a legal sense, and the objection to it on that ground is not well taken.

11. The statute requires that a copy of the notice be published in a newspaper of the county, and it is assumed that it should be of general circulation. The circulation of the Sunday Welcome through the mails, by delivery, and by news stands is from 1,000 to 1,100 copies, and it is not confined to any particular class or sect of individuals. It is sensational in tone, contains the sporting and some current news of general interest, many advertisements of a business nature, and has been made the medium for legal publications for more than two years, beyond which the evidence does not extend. Such a publication would seem to fall within the legal acceptance of a newspaper. Mr. Justice MITCHELL, in *Hull v. King*, 38 Minn. 349, 350 (37 N. W. 792), in attempting to give a very general definition of a newspaper, says that according

to the business world, and in ordinary understanding, it is "a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest." A publication may be devoted to the dissemination of knowledge or intelligence of a particular kind, or to the advocacy of particular views; but if it also contains information of current events, and news of importance and interest to the general reading public, it is nevertheless a newspaper within the meaning of the term. So it is that publications devoted mainly to the promulgation of religious news and doctrines of a religious sect, or essentially to the dissemination of legal learning and literature, when devoting a portion of their columns to news matters of current and public interest, have been held to come within the designation: *Hull v. King*, 38 Minn. 349, 350 (37 N. W. 792); *Kellogg v. Carrico*, 47 Mo. 157; *Keer v. Hitt*, 75 Ill. 51; *Railton v. Lauder*, 126 Ill. 219 (18 N. E. 555) *Pentzel v. Squire*, 161 Ill. 346 (43 N. E. 1064, 52 Am. St. Rep. 373); *Lynch v. Judge of Probate*, 101 Mich. 171 (45 Am. St. Rep. 404, 59 N. W. 409); *Lynn v. Allen*, 145 Ind. 584 (44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223). *Kerr v. Hitt* is fairly illustrative of the subject-matter, where it was held that the Chicago Legal News, published once a week, devoted principally to the dissemination of legal intelligence, but making reference to passing events and containing advertisements, brief notices of legislative bodies, and personal and political items of interest to the general reading as well as the legal profession, was a newspaper of the character contemplated by statute. We are therefore of the opinion that the Sunday Welcome falls within the category of a newspaper. It was further urged that the immoral tone of the paper inhibits its dissemination among respectable people; but its publication is not prohibited by law, nor is it denied access to the mails, so that its issuance and promulgation is at least lawful; and, so long as it publishes current news items of general public interest, we must assume that, with

the circulation it has, it is read more or less by the general public.

12. The return of the sheriff upon the execution, as it pertains to the posting of the notice of sale, is as follows: "I further certify that I advertised said sale also by posting copies of the said notice in three public places in the County of Multnomah and State of Oregon for four weeks immediately prior to said sale, said notices so posted being identical in form with the notices so published;" and it is objected that such proof of posting is insufficient, in that it does not set forth facts showing that the places where the notice was posted are public places. Like returns of sales under execution, however, have received the sanction of this court (*Bank of British Columbia v. Page*, 7 Or. 454; *German Loan Soc. v. Kern*, 38 Or. 232, 62 Pac. 788, 63 Pac. 1052); so that the sufficiency and validity of the present one is established by precedent.

AFFIRMED.

Decided 3 June, 1902.

REYNOLDS v. SCRIBER.

[69 Pac. 48.]

STATUTE OF FRAUDS—PART PERFORMANCE.

1. To constitute such a part performance of a parol contract for the sale of personal property at a price of more than \$50 as to take the transaction from under the inhibition of the statute of frauds (Hill's Ann. Laws, § 785, subd. 5), the acts relied upon must have reference to the contract, and have been done solely with a view to its performance; acts preliminary or ancillary to the agreement are not sufficient. This case illustrates this rule: Plaintiff was president and business manager of a corporation, and the owner of a large amount of stock, including several shares of treasury stock. Defendant agrees to purchase plaintiff's entire holding, plaintiff agreeing to surrender the treasury stock for cancellation on repayment to him by the corporation of the amount paid therefor. Plaintiff's certificates of stock, and two notes against plaintiff, which defendant had agreed to take up and deliver to plaintiff as part of the consideration, and which had actually been purchased by defendant, were turned over to an attorney to enable him to reduce the contract to writing, but not for the purpose of having either notes or stock delivered to plaintiff or defendant. Plaintiff resigned as officer of the corporation, and testified that such action was in reliance on defendant's promise to complete the contract, and that his acquiescence in a resolution canceling his treasury stock was for the same reason, while defendant's evidence was to the effect that plaintiff's resignation was because of dissatisfaction with

his conduct of the business, and that the treasury stock was canceled because illegally issued. *Held*, that the delivery of the stock and notes for the purpose for which they were delivered, and plaintiff's resignation, and acquiescence in the cancellation of the stock, under the conflicting evidence as to the cause thereof, did not constitute a part performance of the contract, removing it from the operation of the statute of frauds, and entitling plaintiff to specific performance.

FRAUDULENT INTENT NO SUBSTITUTE FOR PART PERFORMANCE.

2. The fact that defendant's motives may have been fraudulent, or that his action has inflicted a wrong on plaintiff, is not ground for the interposition of equity, in the absence of part performance.

From Union: ROBERT EAKIN, Judge.

This is a suit by J. E. Reynolds against J. W. Scriber to enforce the specific performance of a contract for the purchase of personal property. On March 10, 1900, these parties were stockholders in the Union County Alliance Flouring Mill Co., a corporation with a capital stock of \$25,000, divided into 2,500 shares, of the par value of \$10 each. The plaintiff owned 1,218 shares acquired by subscription, and claimed to own 70 shares of treasury stock, and was president and business manager of the corporation, at a salary of \$100 a month. The defendant was the owner of 80 shares in his own right, and had contracted for the purchase of 735 additional shares. On the day named, the plaintiff entered into negotiations with defendant for the sale of the 1,218 shares, and the surrender for cancellation of the treasury stock, which finally resulted in an offer by the plaintiff to sell the 1,218 shares for \$6,850, and the acceptance thereof by the defendant; the plaintiff agreeing to surrender the 70 shares for cancellation upon the repayment to him by the company of \$490, the amount claimed to have been paid therefor. In payment for the shares so contracted for, the defendant was to take up and deliver to the plaintiff two notes executed by him and held by one McKinnis, amounting in the aggregate to \$2,735.26, and to pay the remainder in installments. After some further negotiations, the parties went to the office of Mr. Slater, an attorney at La Grande, for the purpose of having the contract reduced to writing, and, although one was prepared, it was never exe-

cuted. To enable Slater to prepare the necessary papers, the certificates of stock held by the plaintiff, and also the McKinnis notes, which in the mean time had been purchased by and assigned to the defendant, were delivered to him. About the same time the plaintiff and defendant called at the La Grande National Bank, to which the mill company was indebted in the sum of about \$13,000, and, as the evidence tends to show, upon the representation of the defendant that he had purchased the plaintiff's stock in the company the bank permitted him to take up the indebtedness held by it against the corporation. Thereafter, and up to the 20th, there seem to have been some negotiations between the parties looking to the consummation of the contract, but without avail. On the 20th, at a meeting of the board of directors of the mill company, of which the defendant was not a member, however, a resolution was adopted directing the payment to the plaintiff of the amount alleged by him to have been advanced in payment of the treasury stock, and for the cancellation thereof. The plaintiff at the same time resigned as president and manager, on an assurance, as he claims, from the defendant, that he would consummate the contract and purchase the stock, which he subsequently refused to do. The next day the plaintiff executed, in form, a proper assignment of the certificates of stock to the defendant, which he tendered to him, and, upon his refusal to accept them, this suit was brought to enforce a specific performance of the contract.

AFFIRMED.

For appellant there was a brief over the names of *Thos. H. Crawford* and *C. H. Finn*, with an oral argument by *Mr. Crawford*.

For respondent there was a brief and an oral argument by *Mr. J. D. Slater*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. There is some controversy in the testimony, and it is somewhat doubtful whether the contract is so clearly and unmistakably proven as to enable a court of equity to enforce its specific performance; but, waiving that point, we are of the opinion that it is void under the statute of frauds, and cannot be enforced for that reason. The contract rests entirely in parol, but it is sought to take it out of the statute on the ground of part performance. It is a familiar rule that where a parol agreement has been so far executed by one party, with the assent and acquiescence of the other, that it would amount to a fraud to allow the latter to repudiate it and shelter himself under the provisions of the statute, a court of equity will interfere and defeat or prevent the fraud by compelling its specific performance: 2 Story, Eq. Jur. (13 ed.) § 759; Browne, Stat. Frauds, § 448b. To constitute a part performance, however, within the meaning of this rule, the acts relied upon for that purpose must have reference to the contract, and clearly appear to have been done solely with a view to its performance. Acts merely preliminary or ancillary to the agreement, such as delivering an abstract of title, giving directions for a conveyance, the preparation of the agreement, making valuations, and other like acts, are not sufficient: 2 Story, Eq. Jur. (13 ed.) § 762; Waterman, Spec. Perf. § 262. Whatever was done must have been done under the contract, and in part performance of its terms, and should tend to show not only that there had been an agreement, but throw some light upon its nature, so that neither the fact of the contract nor its execution rests solely upon parol evidence. Now, there is no evidence in this case of such a part performance of the contract sought to be enforced as will take it out of the statute. It is urged that the delivery of the certificates of stock and the McKinnis notes to Slater was sufficient for that purpose. But the evidence clearly shows that they were handed to him for the purpose of enabling him to draw up the necessary contracts and papers, and were not intended in any way as in

execution or performance of its terms. The certificates of stock were not delivered to or accepted by the defendant, nor did he at any time assert any right thereto. The plaintiff himself testifies that he did not intend that the stock should be delivered to the defendant until the McKinnis notes were delivered to him, and the balance due on the purchase price of the stock secured, so that there is no room, under the testimony, for the contention that the delivery of the certificates of stock and the McKinnis notes to Slater was in part performance of the contract.

It is also contended that the resolution of the directors of the mill company canceling the treasury stock, and the resignation of the plaintiff as president and manager of the corporation, are a sufficient performance of the agreement to take it out of the statute; but the evidence does not show that such action in either case was taken solely in pursuance of the terms of the contract, or with the actual or constructive assent of the defendant as part performance thereof. There is a sharp controversy in the testimony as to why the resignation took place, and how the resolution came to be adopted. The plaintiff says that he resigned because of a promise made at the time by the defendant to complete the contract, and that the resolution canceling the treasury stock was acquiesced in by him for the same reason. The defendant, however, has an entirely different version of the transaction. His testimony is to the effect that neither the resignation nor resolution had anything whatever to do with the contract between the plaintiff and himself, but the resignation was brought about by the dissatisfaction of the board of directors with the plaintiff's management of the business, and the treasury stock was canceled because it had been illegally and unlawfully issued. It is apparent, therefore, that the resignation of the defendant and the cancellation of the treasury stock are not sufficient, under the testimony, to authorize a court of equity to enforce a void contract for the purchase by defendant of plaintiff's stock in the corporation. It is true that the statute referred to was enacted for the purpose of preventing fraud, and therefore cannot be

made available in aid of fraud; but a parol agreement for the sale of personal property at a price not less than \$50 is as void in equity as at law, unless the buyer accept and receive some part of such property, or pay at the time some part of the purchase money: Hill's Ann. Laws, § 785, subd. 5. It is only when there has been such a part performance of a contract void under the statute as would enable the defendant to perpetrate a fraud upon the plaintiff unless it is specifically enforced that a court of equity will enforce its performance.

2. The mere fact that one party refuses to perform the terms of his contract, however fraudulent may be his motives, or however great a wrong it may inflict upon the other, is no ground in itself for the interposition of a court of equity. This principle disposes of the argument based on the act of the defendant in acquiring an assignment of the indebtedness to the La Grande National Bank from the mill company, and also of the motion to vacate the decree and for leave to file a supplemental bill.

We are of the opinion, therefore, that under the law and the facts in this case the decree of the court below should be affirmed, and it is so ordered.

AFFIRMED.

Decided 3 June, 1902.

CARROLL v. NODINE.

[69 Pac. 51.]

NOTES—IMPLIED WARRANTY UPON INDORSEMENT WITHOUT RECOURSE.

1. The indorsement of a promissory note without recourse carries an implied warranty by the seller that it and the previous indorsements on it are genuine, and is intended, like a delivery, to carry title, but such an indorsement is not a contract.

PAROL EVIDENCE—INDORSEMENT WITHOUT RECOURSE.

2. An unqualified indorsement of negotiable paper is a written contract excluding parol evidence to vary its terms, while an indorsement without recourse is not a contract, but merely operates to transfer the title; and hence parol evidence is admissible to show that at the time of the transfer of a note by indorsement without recourse the buyer agreed to take the paper at his own risk, absolutely relieving the indorser even from the implied warranty of genuineness attending such a transfer.

SUFFICIENCY OF NOTICE TO INDORSEE AS INDEMNITOR.

3. The purchaser of a note sued the maker, who defended on the ground that an indorsement of payment appearing on the note was not genuine, and that without this payment the note was barred by limitation. The seller of the note, who had indorsed without recourse, agreed at the time of the sale to appear as a witness for the purchaser in case he sued on the note, and did so appear, though notified of the pendency of the suit only a few hours before taking the witness stand. She was not asked to assume or assist in the defense. *Held*, that the notice was nevertheless sufficient to make the judgment in the suit binding on her.

From Union: ROBERT EAKIN, Judge.

This is an action by W. T. Carroll to recover from Eliza Nodine upon an implied warranty on the sale without recourse by defendant to plaintiff of a certain promissory note made and executed by Louisa A. Hudson and Thomas R. Hudson to Fred Nodine on August 21, 1878, for the sum of \$150, with interest at 10 per cent per annum, and by the latter indorsed to the defendant. The note was secured by a mortgage upon real property in the City of Union, Oregon. Several payments were indorsed thereon, including one of \$7, of date October 25, 1893. The complaint contains appropriate allegations showing that suit was subsequently commenced to foreclose, and the defense interposed that the \$7 indorsement was not a genuine payment, by reason whereof the statute of limitations had run against the note. The answer sets up, among other things, that, at the time the defendant sold and indorsed the note to plaintiff, he was fully informed of all matters concerning the credit made thereon of date October 25, 1893, and that the same was a valid and genuine payment; that he then guarantied that she should never at any time be held liable upon said note in any capacity, or for any part thereof; and that her indorsement of said note without recourse would, and in fact did, forever relieve and protect her from all liability thereon. The case went to trial upon the issues thus tendered, with others, and, plaintiff having recovered judgment, the defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief over the names of *C. E. Cochran*, and *Thos. H. Crawford*, with an oral argument by *Mr. Crawford*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

There are but two errors relied upon for reversal. It is first contended that the plaintiff, at the time he purchased the note, agreed and guarantied that the defendant should never be held liable thereon in any capacity, and that such an agreement constitutes a valid defense to the action. The question arose upon an attempt to prove the express warranty set up in the answer by parol, which the court refused to permit, under the idea that the contract, being in writing, could not be thus varied. The theory of the plaintiff is that the indorsement of the note fixes and determines the relation of the parties to the transfer,—that is, imports a contract in writing between them,—and that, like other contracts of the kind, cannot be varied or controlled by a contemporaneous verbal agreement, as it is presumed that the whole understanding of the parties has been incorporated in the writing. The case of *Smith v. Caro*, 9 Or. 278, and other cases of like nature, are relied upon in support of the contention. In the case cited the indorsers simply wrote their names upon the back of the note; and the court held that by the law merchant the indorsement imported a contract in writing, which served not only as a means of transfer, but to fix and determine the liabilities of the indorsers, and that it was not competent to vary the contract by any parol agreement that might have been entered into at the time.

1. The liabilities of an ordinary or unqualified indorser are upon the instrument indorsed, conditioned upon demand and notice; but where the transfer is by indorsement without recourse, or by delivery, the vendor's liabilities arise from the fact or contract of sale, and not upon the paper. The purpose of such an indorsement, like delivery, without indorsement, is simply to carry title to the purchaser, without alone importing

a contract: 4 Am. & Eng. Ency. Law (2 ed.), 475. The authorities are in unison, however, that where a note is thus transferred there is an implied warranty by the seller that it is what it purports to be, and, as applied to the exigencies of this case, that no payments have been made, except those that appear to have been indorsed thereon, and that such as so appear are genuine, and operate to continue the obligation in force as against the statute of limitations: *Bank v. Smiley*, 27 Me. 225 (46 Am. Dec. 593); *Society v. Giddings*, 96 Cal. 85 (30 Pac. 1016, 31 Am. St. Rep. 181); *Hannum v. Richardson*, 48 Vt. 508 (21 Am. Rep. 152). There is an intimation in a note to *Drennan v. Bunn*, 7 Am. St. Rep. 354, 366 (124 Ill. 175, 16 N. E. 100), that the general rule that oral evidence is inadmissible to change the contract of indorsement relates to restrictive indorsements, also, and, extended, it applies to indorsements without recourse. The authorities referred to, however, as sustaining the principle, go to the proposition that it cannot be shown by parol that an unqualified indorsement was made for the sole purpose of transferring the title, and that it was agreed at the time that the words "without recourse" should be written over it. This, it appears to us, is coming back to the same question.

2. An indorsement without recourse is a very different thing from an unqualified indorsement; and it would be just as objectionable to show an agreement by parol that the vendor should be relieved of all liability on the instrument, as it would be that the vendor agreed to waive demand and notice, which was the case of *Smith v. Caro*, 9 Or. 278. In either case there is a variance of the contract which the unqualified indorsement imports. We have been unable to find any case covering the exact point here. Where an article of personalty in the vendor's possession is sold and delivered to another, and nothing is said, there goes along with the contract an implied warranty of title, and a failure thereof renders the vendor liable. The implied warranty attending the sale of commercial paper arises upon like principle: *Hannum v. Richardson*, 48 Vt. 508 (21 Am. Rep. 152). It will hardly be disputed that the ven-

dor of personalty may by verbal understanding or agreement limit the liability under the implied warranty of title, and thereby make the transfer entirely at the purchaser's risk; and why should not the same principle govern as to the sale and delivery of commercial paper, where the indorsement merely operates to transfer the title? And to carry the reasoning a little further, there is no implied warranty by a sale and simple delivery of the paper, or by indorsement without recourse, of the solvency of the maker or other person liable for its payment; but we take it to be unquestioned now that the vendor may, by express verbal agreement, warrant the solvency of such parties, and thereby render himself directly liable in case of their default in payment. The statute of frauds does not stand in the way of such an agreement: *Milks v. Rich*, 80 N. Y. 269 (36 Am. Rep. 615); *White v. Webster*, 58 Ind. 233. So that it may be deemed competent for the vendor to verbally enter into an express warranty with relation to the paper in connection with the transfer of the title, and the only question that remains is whether it is superseded by the contract which the mere delivery or indorsement without recourse implies. But we have seen that such an indorsement does not constitute a contract in writing, and serves merely to transfer title, as in the case of delivery when payable to bearer. In *Smith v. Corege*, 53 Ark. 295 (14 S. W. 93), the vendor, by verbal agreement, expressly warranted that the paper transferred by delivery was good, and hence not tainted with usury; and the court permitted the establishment of the agreement against an objection that it was contrary to the statute of frauds. Now, if it be permissible to show by parol an express warranty that the paper is not usurious, or that the makers are solvent, why is it not equally competent to show by parol that the purchaser agreed to take the paper at his own risk, absolutely, and thus relieve the vendor of all liability of whatsoever nature that ordinarily attends the sale and transfer by such methods where nothing is said to vary the effect of the transaction? Logically there is but one answer to the question, which is that the ver-

bal agreement may be shown, and we are constrained to so hold.

3. This entails a reversal of the judgment, without more; but the other question presented will again arise on a retrial, and may induce another appeal, hence we deem it important that we should pass upon it now. After the indorsement and transfer of the note, the plaintiff sued the makers, and the defendant here was a witness on the trial. She appeared at the request of the plaintiff made on the same day, and but a few hours previous to taking the stand. This was the first knowledge she had of the pendency of the suit, no request having been made that she assist in or take charge of the defense; nor was she notified in any manner that she must assume the responsibilities thereof. It developed on her cross-examination that she agreed with the plaintiff at the time of the sale and transfer of the note and mortgage to be a witness for him in case suit should be brought against the makers. Now it is contended by defendant that the decree obtained in that suit was not admissible against her in this action, because she was not given adequate and proper notice of the pendency thereof, and required to assume the burden of the defense. The contention proceeds upon the hypothesis that the defendant is an indemnitor, dependent upon the finding of the jury as to the agreement, and her consequent liability attending the sale of the note and mortgage. As indemnitor, the primary liability for the loss incurred by a failure to prove that the \$7 payment was genuine, and entitled to rightful and lawful indorsement upon the note, rested upon her. Such a relation brings her into privity with the purchaser, the party to be indemnified; and she, as well as the plaintiff, had a direct interest in defending the suit. But before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to

controvert the matter anew upon an action against him upon the indemnity contract or obligation. Of course, the suit or action that works the estoppel must have been prosecuted without collusion or fraud, as it affects the indemnitor. While notice of the pendency of the suit or action is always necessary to render the decree or judgment binding upon the indemnitor, the better reason and the weight of authority dispense with any request to take charge of or assume the responsibilities of the defense. Having notice, the indemnitor may, as it is his right, interpose and make such defense as to him might seem most expedient and effective; and, if he did nothing in that direction, it must be considered a matter of his own volition, and a request for him, coupled with a warning of consequences, to do that which duty and interest require him to do, would seem superfluous, and the law, which is founded upon reason, does not require a vain thing.

The question thus recurs whether defendant had reasonable notice, or such under the circumstances attending the controversy as required her to defend or abide the consequences. The notice given her was of very short duration, and we are not prepared to say that it would have been sufficient ordinarily, but she actually attended as a witness, and gave evidence on trial; and, what is of far greater consequence, and a circumstance of decisive moment, she agreed at the time she sold the note to testify in the case, if called upon; thus anticipating a suit at the time, and impliedly indicating her willingness that plaintiff should conduct the defense in her behalf, and that she would aid him by her testimony, if desired. The circumstances are such as to make the decree binding upon her. In support of these views, see *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 475 (43 N. W. 321); *Davis v. Smith*, 79 Me. 351 (10 Atl. 55); *City of Boston v. Worthington*, 10 Gray, 496 (71 Am. Dec. 678); *City of Chicago v. Robbins*, 67 U. S. (2 Black) 418; and *Robbins v. City of Chicago*, 71 U. S. (4 Wall.) 658.

The ruling of the trial court as to this latter contention was

therefore correct, but, for error as to the first, the judgment will be reversed, and the cause remanded for such further proceedings as many seem appropriate. REVERSED.

Decided 3 June, 1902.

COUGHANOUR v. HUTCHINSON.

[60 Pac. 68.]

EVIDENCE TO JUSTIFY REFORMATION OF A DEED.

1. The undisputed evidence as to the mutual mistake alleged in the complaint was quite sufficient to justify a reformation of the deed in question.

DISMISSAL OF FORECLOSURE SUIT AS A RELEASE OF THE MORTGAGE.

2. A part of a tract of mortgaged land was sold to plaintiff, but the deed misdescribed the land so that plaintiff had no record title thereto. The mortgagee, on commencing foreclosure proceedings, made plaintiff a party, but, on finding that he had no record title, dismissed as to him. *Held*, not to be a release of any of the mortgagee's rights as to the land conveyed to plaintiff.

MORTGAGE FORECLOSURE—EFFECT OF OMITTING SUBSEQUENT PURCHASERS.

3. In mortgage foreclosures all persons who have become interested in the property subsequent to the execution of the mortgage should be made parties, and the interests of those of such persons as are not brought in are not affected by the decree.

RIGHT OF POSSESSION OF PURCHASER AT MORTGAGE SALE.

4. A purchaser at a sale under a decree of foreclosure of a lien is entitled to retain possession, as against the mortgagor and all persons claiming under him, until the debt is paid.

DECREE MUST FOLLOW THE PLEADINGS.

5. Judgments and decrees must follow the pleadings on which they are based, and even a court of equity having jurisdiction cannot grant relief beyond or other than that justified by the pleadings.

From Union: ROBERT EAKIN, Judge.

This is a suit by W. A. Coughanour against Jas. H. & W. R. Hutchinson and Jas. Welch and wife to reform a deed and for possession of real property. On January 31, 1885, the defendants Welch and wife mortgaged certain lands in Union County, including the south half of the northwest quarter and the north half of the southwest quarter of section 22, township 6 south, range 38 east, Willamette Meridian, to the defendants Hutchinson to secure the payment of a promissory note for \$3,450. In July, 1886, they sold and conveyed all of the mort-

gaged premises, except that portion above described, to Marshall, Ramsey, and Hall, who agreed, as a part consideration therefor, to pay and discharge the Hutchinson mortgage. On May 25, 1887, Welch and wife sold and intended to convey that portion of the mortgaged premises above described to the plaintiff in this suit, but by mutual mistake the deed did not include the property intended to be conveyed. On December 24, 1889, the Hutchinsons commenced a suit to foreclose their mortgage, making Welch and wife, Marshall, Ramsey, and Hall and the plaintiff parties; but the plaintiff was not served with process, and did not appear in the suit. After an answer had been filed by Welch, and pending the trial, it was ascertained that the plaintiff had no interest of record in the mortgaged property. The suit was thereupon dismissed as to him, and an agreement reached by which no personal judgment should be taken against Welch. It was thereupon stipulated that the Hutchinson brothers should take a decree foreclosing the mortgage, but no personal decree against Welch, in pursuance of which a decree was rendered on the 23d of September, 1890, against Marshall, Ramsey, and Hall for the amount due on the note secured by the mortgage, and for a foreclosure and sale of the mortgaged premises. An execution was thereafter issued, and the entire property was sold for \$2,500 on November 21, 1890, to the Hutchinsons, who immediately entered into, and have ever since remained in, possession thereof. Some time about February 1, 1900, the plaintiff discovered the error in his deed from Welch, and thereupon brought this suit to have it corrected, and for possession of the property intended to be conveyed thereby, and an accounting for the rents and profits thereof. The complaint alleges the sale by Welch to the plaintiff, the mutual mistake in the deed, and the discovery of the error about the time the suit was commenced; that in November, 1890, the Hutchinsons wrongfully, unlawfully, and without authority of the plaintiff, took possession of the property, and have ever since retained and held the same from him; that the use thereof is worth the sum of \$100 a year, by reason of which the plaintiff has been dam-

aged in the sum of \$600,—and asks for a decree reforming the conveyance, and requiring the Hutchinsons to surrender possession of the property to the plaintiff, and for the sum of \$600, the rental value thereof. The answer of the Hutchinsons denies the material allegations of the complaint, and, for an affirmative defense, sets up the mortgage to them by Welch and wife, the foreclosure thereof, and the subsequent proceedings resulting in a decree, the issuance of an execution, the sale of the property thereunder and its purchase by the Hutchinsons, their entry into possession, and the confirmation of the sale. Welch and wife also filed an answer, in which they admit the execution of the mortgage, the foreclosure thereof, the sale of the property, the purchase by the Hutchinsons, and their entry into possession, and, for a further and separate defense, allege, in effect, that after the commencement of the foreclosure suit, and prior to the decree therein, it was agreed by the Hutchinsons and Welch that the former should have a decree foreclosing their mortgage upon releasing their lien upon the land now in controversy, and waiving a claim for a personal decree against Welch; that it was intended to embody such agreement in a written stipulation filed in the foreclosure suit, but, by a mistake of the attorneys who drew it up, it was stated that a decree might be taken foreclosing the mortgage upon all the lands described therein. It is also alleged that, at the time of the making of such stipulation and the entry of the decree, the Hutchinsons knew that the plaintiff had and claimed an interest in the land in controversy, and was in possession thereof. Plaintiff's reply to the answer of the Hutchinsons is of like tenor. A reply filed by the Hutchinsons puts in issue the material allegations of Welch's answer. Upon the testimony taken, the court entered a decree reforming the conveyance set up in the complaint so as to include the property intended to be conveyed thereby, but denying the prayer for its possession, and from this decree the plaintiff and the defendants Welch appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. J. D. Slater*.

For respondents there was a brief and an oral argument by *Mr. Leroy Lomax*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

There are two questions of fact to be determined: The defendants Hutchinson insist that the proof is not sufficient to authorize the reformation of the deed from Welch and wife to the plaintiff, and the plaintiff and defendant Welch contend that it was agreed and stipulated at the time the decree of foreclosure was entered that the property in controversy should be released from the lien of the mortgage and decree.

1. Welch testified that in 1887 he sold and intended to convey to the plaintiff what is known as the "Pilcher Place," being part of the premises described in the mortgage; that he handed the Pilcher deed to the notary to obtain a description from it, and supposed that the land was correctly described; that he first learned of the mistake a short time before this suit was commenced. The plaintiff testified that he bought the Pilcher place and two other tracts of land, adjoining the Town of North Powder, from Welch, and supposed they were properly described in the deed until a short time before he commenced this suit; that, some time prior to the commencement of the foreclosure suit by the Hutchinsons, he went into possession, and rented the land to a man living on an adjoining farm. These witnesses are not contradicted in any way, so that it is clear there was an error in the deed from Welch to the plaintiff, which occurred through the mutual mistake of the parties, and the court was manifestly right in decreeing that it be reformed.

2. There is no testimony that the Hutchinsons ever agreed to release any part of the mortgaged premises. After the suit to foreclose was commenced, it was ascertained from an examination of the record by the attorneys for the Hutchinson

brothers and Welch that plaintiff had no record title to any of the mortgaged property; and in accordance with the information thus obtained, and without any knowledge of the real facts, the suit was dismissed as to the plaintiff. It is quite clear that it was not intended by any of the parties that the plaintiffs in the foreclosure suit should release any of the property described in the mortgage, and there was no mistake in this regard in the stipulation. It was made in accordance with what the attorneys supposed to be the facts in the case, and with no intention that the Hutchinsons should surrender any of their rights under the mortgage.

3. The remaining question is as to the decree that should be entered in this suit. There is evidence tending to show that at the time the foreclosure suit was commenced the Hutchinsons had either actual or constructive notice that plaintiff claimed some interest in or title to a portion of the mortgaged premises. If this was so, they should have made him a party to the foreclosure suit, in order to bar his claim to the property, and, not having done so, his interest is in no way affected by the decree: *Webb v. Maxan*, 11 Tex. 678.

4. But as the holders of the legal title were parties to the suit, the sale under the decree was effective to convey such title to the purchasers, and the plaintiff is not entitled by reason of his equitable title to possession as against them. The Hutchinsons, having purchased under the decree and entered into possession of the property, have a right to retain it, as against the mortgagor and all persons claiming under him, until their debt is paid: 1 Jones, Mortg. § 115; *Cooke v. Cooper*, 18 Or. 142 (22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709).

5. The plaintiff's remedy is either to redeem, or perhaps by a suit to compel the Hutchinsons to elect whether they will accept the amount due on their mortgage, or release the land claimed by him: *Wilson v. Tarter*, 22 Or. 504 (30 Pac. 499). But this is not a suit for permission to redeem, or for the purpose of compelling an election by the defendant; and it is not believed that the court is authorized, under the pleadings or

the evidence, to make such a decree. Where a junior lien holder or an equitable owner of the mortgaged premises is not made a party to the foreclosure suit, he is entitled to redeem from the purchaser under the decree by paying the amount of the mortgage debt, interest, taxes, assessments, and prior incumbrances paid by the purchaser, with such expenses as he may have incurred in the matter of necessary repairs, and in some instances permanent improvements, less the rents, issues, and profits: *Poole v. Johnson*, 62 Iowa, 611 (17 N. W. 900); 2 Jones, Mortg. § 1075; 11 Am. & Eng. Ency. Law (2 ed.), 226, 235, 237. It is essential, however, that a bill to redeem should contain appropriate allegations upon which these matters can be determined and an accounting had, and it must also either make a tender, or at least contain an offer to pay whatever may be found due: 2 Jones, Mortg. § 1095. The complaint in this case does not mention the mortgage of the Hutchinsons, or concede that there is anything due thereon. It contains no allegations upon which an accounting can be had, nor averment of an offer to pay. It is confined solely to the question of the reformation of the deed from Welch to the plaintiff, and the possession of the property. The plaintiff does not rely upon the right of redemption, but seeks to establish a legal title to the land, and to obtain possession thereof. A court of equity delights, when possible, to do full and complete justice between the parties in a suit; and therefore, having acquired jurisdiction for one purpose, it will ordinarily retain it for all purposes necessary to accomplish that object: 1 Pomeroy, Eq. Jur. § 181. But it must confine its relief to the issues made by the pleadings, and is as much bound to observe the rules of pleading as a court of law. The plaintiff is entitled to have the deed from Welch reformed so as to describe the land intended to be conveyed, but is not entitled to a decree for the possession of the land; so that it must be determined in some appropriate proceedings brought for that purpose whether, under the facts and the law, he can now redeem. The decree of the court below is therefore affirmed.

AFFIRMED.

Decided 16 June, 1902.

MALE v. SCHAUT.

[69 Pac. 137.]

TRIAL BY JUDGE WITHOUT A JURY—FINDINGS MUST FOLLOW PLEADINGS.

Where law actions are tried before a court without a jury the findings must follow and be limited by the pleadings—while they should cover every material issue of fact, they should not be made on other issues.

From Union: ROBERT EAKIN, Judge.

This is an action by William H. Male and others against George Schaut and wife and John Huber on a promissory note. The complaint alleges, in substance, that on January 30, 1893, the defendants executed and delivered to one W. L. Telford their promissory note for \$1,450, due December 1, 1897, with interest thereon at the rate of 8 per cent per annum, payable semiannually according to the terms of ten certain interest coupons thereto attached, both principal and interest payable at the office of the American Investment Co. at New York City; that it is provided therein that, if any interest coupons should remain unpaid twenty days after due, the principal should, at the option of the holder, become due and collectible at once, without notice; that interest coupons Nos. 4, 5, 6, and 7 are each and all more than twenty days past due; that, prior to the maturity of the note and coupons, they were, for a valuable consideration, sold, assigned, and transferred to the plaintiffs, who have been ever since, and now are, the owners and holders thereof; that plaintiffs elect to declare the whole of the principal sum and interest due and collectible, and demand a judgment for the amount thereof.

The defendant Huber alone answers. He admits the execution and delivery of the note as alleged, but denies that any of the interest coupons mentioned and described in the complaint are due or unpaid; denies the assignment and transfer of the note and coupons to the plaintiffs prior to maturity, or at any other time; denies that there is any amount due on the note or the interest coupons; and, for an affirmative defense, alleges that, at the time of the making and execution of the

41	426
42	612
41	425
147	303

note, the defendants, to secure the payment thereof, executed and delivered to Telford a mortgage upon certain described real estate; that on or about the 1st day of March, 1893, Telford, for value received, sold and transferred the note and mortgage to the Mercantile Trust Co., a corporation existing and doing business under the laws of the State of New York, which company remained the owner and holder thereof until the mortgage was foreclosed, and all matured coupons fully paid and satisfied; that on or about the 12th day of February, 1894, one Alford, the holder of a prior mortgage upon the same real estate, commenced a suit in the circuit court of Wallowa County against Telford and the defendants herein to foreclose his mortgage; that thereafter the Mercantile Trust Co. was made a party to the foreclosure suit, and answered, setting up the mortgage given to Telford, and by him assigned to it, and praying for a decree for the amount due thereon and for its foreclosure; that afterwards, and on or about the 19th of April, 1894, such proceedings were had in the Alford suit that a decree was rendered in favor of the Mercantile Trust Co. for the amount then due on the promissory note and interest coupons, for the foreclosure of the mortgage, and for the sale of the mortgaged premises to satisfy such decree; that thereafter an execution was duly issued, and the property sold to one E. B. Soper for the sum of \$3,050, being the aggregate amount of all sums due the plaintiff in such foreclosure suit and the Mercantile Trust Co., besides interest, costs, and expenses of the sale; that thereafter the execution was returned satisfied in full, the sale duly confirmed, and after the expiration of the time for redemption the property was conveyed by the sheriff to Soper, the purchaser.

The reply denies that the mortgage given to Telford to secure payment of the promissory note in controversy was ever foreclosed, or that the Trust Company ever became a party to the suit brought by Alford to foreclose his mortgage, and, as affirmative matter, alleges that the pretended answer and cross complaint filed on its behalf in the Alford foreclosure suit was filed without any authority from, or knowledge of, the com-

pany, and that it had no information thereof until long after the pretended decree had been entered, and long after the plaintiffs had become the owners of the promissory note and interest coupons.

Upon the issues thus joined the cause was tried, by stipulation of the parties, without the intervention of a jury, and the court made its findings of fact and conclusions of law substantially as follows: (1) That although the note sued on, and the mortgage given to secure the payment thereof, were made in the name of Telford, they were in fact executed for a loan made by the American Investment Co., and for its benefit, and were immediately after their execution transferred to the company by blank indorsements; (2) that in April, 1893, the note was transferred by the Investment Company to the Trust Company, without further indorsement, as collateral security for the payment of certain debenture bonds of which the Trust Company was trustee; (3) that, the Investment Company having become insolvent, the note and mortgage in question, together with other notes and mortgages, were sold by the Trust Company at public auction on the 14th day of December, 1894, and purchased by the plaintiffs, who constitute a protective committee formed at the request of the holders of the debenture bonds of the Trust Company; (4) that at the request and upon the motion of E. B. Soper, the attorney of the Investment Company, and as a result of counsel taken by him with the president and secretary of that corporation, the Trust Company was made a party to the suit brought by Alford to foreclose the prior mortgage, but the officers of the Trust Company knew nothing of the suit, or of the filing of the answer on its behalf, prior to the sale of the note and mortgage to the plaintiffs; (5) that plaintiffs had no knowledge of the foreclosure proceedings at the time of the purchase by them, nor for some time thereafter; (6) that the purchase made by Soper of the mortgaged property at the sale under the execution issued on the foreclosure decree was for the sum of \$3,050, was in full satisfaction of such decree, and made for the benefit of the invest-

ment and trust companies, Soper himself advancing the amount due on the first mortgage and costs, but not paying any other sum on such purchase; (7) that in February, 1895, and prior to the issuance of the sheriff's deed to Soper, he communicated with the plaintiffs, through their agents, in regard to the foreclosure sale and his bid thereon, and the plaintiffs, as such protective committee, released him and the property from all claims on account of transactions in regard to the foreclosure sale and purchase of the mortgaged premises. As conclusions of law, the court found, in effect, that the Trust Company was not bound by the decree rendered in the Alford foreclosure suit, because the appearance of the attorney on its behalf was unauthorized and without its knowledge, but that the subsequent acts of the plaintiffs in releasing Soper from any further liability or responsibility on account of his purchase ratified and approved his acts in foreclosing the mortgage and in purchasing the property, and therefore they cannot now disregard the mortgage and sue upon the note. Based upon these findings of fact and conclusions of law, a judgment was entered, dismissing the action, and plaintiffs appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. Thos. G. Hailey*.

No brief or appearance for respondents.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The principal contention is that the judgment is based upon findings of fact not within the issues made by the pleadings. The execution and delivery by the defendants of the note sued on to Telford, at the date and as alleged in the complaint, the giving of a mortgage to secure its payment, and its sale and transfer for a valuable consideration to the Trust Company, on March 1, 1893, and before maturity, are either affirmatively alleged or admitted in the pleadings. The de-

fense is that, prior to the sale and transfer of the note by the Trust Company to the present plaintiffs, the mortgage given to secure its payment had been foreclosed in the suit brought by Alford to foreclose a prior mortgage, and the mortgaged premises sold, under the decree rendered therein, for sufficient to satisfy the amount due on the note and mortgage. The plaintiffs deny that the Trust Company was a party to the Alford foreclosure suit, or in any way bound by the decree therein, and allege that the answer or cross complaint filed therein on the company's behalf by Soper was without authority. The material issue of fact, therefore, was the validity of the alleged foreclosure decree; and that depended upon whether Soper, who assumed to appear for and represent the Trust Company in that suit as its attorney, had authority to do so. If his appearance was unauthorized, the decree was not binding on the Trust Company, or its successors in interest: *Handley v. Jackson*, 31 Or. 552 (50 Pac. 915, 65 Am. St. Rep. 839). The court found that Soper's appearance was without the knowledge or authority of such company, but that, after the purchase of the note in controversy by the plaintiffs, they ratified and approved Soper's acts, and thus became bound by the decree. This, however, was a matter wholly outside of the issues made by the pleadings. If defendant intended to rely upon the ratification of an unauthorized appearance of an attorney, such ratification should have been pleaded, and the plaintiffs given an opportunity to meet the issue thus raised. It could not otherwise be made the basis of a judgment in this action. It is elementary law, that a finding of fact by a court out side of the issues made by the pleadings is a mere nullity, and will not sustain a judgment: *Green v. Chandler*, 54 Cal. 626; *Brenner v. Bigelow*, 8 Kan. 496; *Newby v. Meyers*, 44 Kan. 477 (24 Pac. 971); *Gamache v. School Dist.* 133 Cal. 145 (65 Pac. 301). In the last case referred to, certain findings were contrary to the admissions in the pleadings, and others were entirely outside of the issues; and it was held that the judgment should be reversed, and the cause remanded, with directions to allow all the parties

to amend their pleadings. This rule, we think, can be applied to the case under consideration, except that under our practice the question as to whether the pleadings shall be amended must in the first instance, be determined by the trial court in the exercise of judicial discretion.

Judgment reversed, and cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 16 June, 1902.

PAYTON v BURNS.

[69 Pac. 134.]

RECORDING CLAIMS IN UNORGANIZED MINING DISTRICTS.

Under Rev. Stat. U. S. § 2324, providing that the miners of each mining district may make regulations regarding the recording of claims, etc., and Hill's Ann. Laws, § 3831, providing that, when a mining district has been organized, the claims therein shall be recorded, claims in a locality not an organized district were not required to be recorded.

From Baker: ROBERT EAKIN, Judge.

This is a suit by E. M. Payton and M. A. Baisley against C. R. Burns to determine an adverse interest in realty. It is alleged in the complaint that plaintiffs are citizens of the United States, above the age of twenty-one years, and having discovered a vein of quartz in place, bearing gold, they on March 7, 1898, located a mine thereon, 1,500 feet in length along the lode, and 300 feet in width on each side thereof, which they named the "Independence Quartz Claim No. 1," situated on unsurveyed public lands in Baker County, Oregon, but not in an organized mining district, which claim was distinctly marked on the ground, so that its boundaries could be readily traced, and they also posted a notice thereon describing the premises by metes and bounds, and ever since that time have been, and now are, the owners of said claim, and entitled to and in the possession thereof, and, each year since said location was made, have expended in improvements made thereon a sum exceeding \$100; that the defendant asserts some claim

thereto adverse to theirs, the precise nature of which is unknown to them, but, whatever it is, it is wrongful and fraudulent. For a second cause of suit, plaintiffs allege that on March 8, 1898, they made another location, which they designated as "Independence Quartz Claim No. 2," the averments in respect thereto being substantially the same as those referring to No. 1, and pray that defendant be required to set forth the nature and extent of his claim, and that it may be decreed invalid.

The answer denies the material allegations of the complaint, and alleges that on July 10, 1896, A. J. Vincent and Thomas McArdle, being citizens of the United States, and having discovered a vein of quartz in place, bearing gold, located a mine thereon, known as the "Vincent," 1,500 feet in length and 600 feet in width, and marked the boundaries thereof so that they could be readily traced on the ground, and posted a location notice thereon; that at the time of plaintiffs' pretended discovery, designated as "Independence No. 2," the whole of said ground was the exclusive property of Vincent and McArdle, subject only to the paramount title of the United States; that about June 1, 1898, McArdle, having made another discovery of mineral in a quartz vein on the ground, called the "Vincent," located a mine thereon known as the "Humbug," the boundaries of which were definitely located on the ground coincident with the Vincent, and posted a notice thereon, which claim, by mesne conveyances, became the property of the defendant, who has complied with all the requirements of law in respect thereto. The answer also contains similar averments as to the discovery of another quartz vein by Vincent and McArdle, bearing gold, and their location of a mine thereon July 10, 1896, known as the "Jojo," 1,500 feet in length and 600 feet in width, the boundaries of which were distinctly marked on the ground, and at the time of plaintiffs' pretended location of the Independence all said land was the exclusive property of said discoverers, subject to the prior right of the general government; that on June 1, 1898, McArdle, having made another discovery of quartz

in place on said ground, bearing gold, located another mine thereon, known as the Snow Storm, which is identical with the JoJoe, the boundaries of which were distinctly marked on the ground, and, having posted a notice thereon, said claim, by mesne conveyances, became the property of the defendant, who had annually expended in making improvements thereon more than \$100.

The reply having put in issue the allegations of new matter in the answer, the cause was referred to Herbert R. Hanna, who took the testimony, from which the court found, in effect, that the description of plaintiffs' alleged mines was too indefinite to entitle them to the relief demanded, and dismissed the suit, whereupon they appeal.

AFFIRMED.

For appellants there was a brief over the name of *Olmstead & Miller*, with an oral argument by *Mr. Martin L. Olmstead*.

For respondent there was a brief over the names of *H. E. Eastham*, and *Cullen & Dudley*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The question presented is whether the location of plaintiffs' alleged mines, known as the "Independence" and the "Independence No. 2," was in fact distinctly marked on the ground where it is now claimed originally to have been made. J. C. Baisley, as plaintiffs' witness, testifies that in 1895 one Milton Garner located quartz mining claims on the land now in controversy; that he assisted him in marking the boundaries of his claims, and was acquainted with and knew the premises in dispute; that in 1896 Garner performed some assessment work on his claims, but not enough to satisfy the law's demands, and, having informed him that he did not intend to return thereto, the witness on March 7 and 8, 1897, as the agent of his wife, the plaintiff M. A. Baisley, and of her sister, the plaintiff E. M. Payton, located the claims in question, which were designated the "Independence" and the "Inde-

pendence No. 2," the latter being an extension of the former, and each 1,500 feet in length, and 300 feet in width on either side of the lode; that at the time he located these claims he discovered the several corners thereof as marked by Garner, and blazed a few trees, indicating the boundaries, and posted on each claim a notice, copies of which were recorded March 13, 1897, in the Baker County records of quartz claims, Book K, pages 87 and 88, respectively, wherein the boundaries of the Independence and Independence No. 2 were described, respectively as follows:

"INDEPENDENCE.

"Commencing at a shaft where this notice is posted, running 1,500 feet in a southerly direction to a stone monument, being end line; thence E. 300 ft. to stone monument; thence northerly 1,500 ft. to stone monument, being N. E. corner of south line; thence N. W. 600 ft. to monument of stone, being N. W. corner of west line; thence westerly 1,500 ft. to stone monument, this being S. W. corner; thence back to beginning. Located on Rock Creek, on Chloride Mountain.

"INDEPENDENCE No. 2.

Beginning at the shaft where this notice is posted, running 1,500 ft. on the vein to stone monument in a northerly direction to stone monument, being north end line; thence westerly 300 ft. to stone monument, this being N. W. corner; thence southerly 1,500 feet to monument, being S. W. corner of west side line; thence S. W. 600 ft. to stone monument, S. W. corner of south line; thence N. W. E. 1,500 ft. to stone monument, being N. W. E. corner; thence back to beginning. Located on Rock Creek, west of Chloride Mine, near 1 mile north of Independence No. 1."

The witness further testifies that, not having evidenced the boundaries of these claims with sufficient care at the time they were located, he returned to the premises in June, 1897, and definitely marked the lines on the ground so that they could be readily traced, blazing nearly every tree that stood in the center of the claims, and also renewed all the mounds

of rock that Garner had built. He states on his cross-examination that he also located another quartz mining claim in his own name and that of his son, which was known as the Red Bird, in speaking of which, in reply to the question, "Where was the Red Bird located?" he says, "Well, it was right on the southerly claim, joined right onto the southerly claim,—of these claims that are in litigation,—and run along west towards the creek." Further in his cross-examination he was asked, "When you made the Red Bird location, where did you put the notice?" to which he replied, "I posted the notice on a little mound of rock just at the upper end of this hole or shaft that was started on the Independence at the southwesterly end, in a little mound of rock." In answer to the inquiry when the Red Bird was located, he says: "I don't know anything about the time I made the location for my son, and told him, if he wanted it, to go ahead and look after it. I don't know the year or the time now. * * Q. Do you know whether it was summer or winter that you located the Red Bird? A. I think it must have been some time in the summer, because the ground was bare when I was up there, I think. I told him there was such a location there, because I wrote the notice on it." The location notice of this mine having been recorded, a certified copy thereof was introduced in evidence, and is as follows:

"RED BIRD.

Location of Quartz. That we, the undersigned, have located 1,500 ft. of this vein of quartz, with 600 ft. in width, described as follows: Commencing at or near where this notice is posted, at west end line of Cordell mine, running westerly 1,500 ft. to stake; thence N. 300 ft. to stake; thence S. 600 ft. to stake; thence W. 1,500 ft. to stake; thence back to beginning. This will be known as the 'Red Bird Mine.' Located near head of Rock Creek, Baker County, Oregon. Located July 7, 1899.

J. C. BAISLEY,
O. BAISLEY.

Recorded September 18, 1899, at page 387, vol. M, of quartz locations of said county."

The testimony introduced by the defendant shows that on August 12, 1899, he purchased the quartz claims known as "Snow Storm," "Humbug," and "Rising Sun," and secured a deed therefor; that these claims extend in a right line from a point north of east to a point south of west, a distance of 4,500 feet, and 600 feet in width; and that the Snow Storm, as far as we are able to discover, is nearly identical with the Independence, and the Humbug with the Independence No. 2, as claimed to have been located by plaintiffs. It would appear that what the plaintiffs now claim to be the Independence and the Independence No. 2 were located for them by J. C. Baisley as the Cordell and the Cordell No. 1, while they insist that the latter claims were located about two miles from the former.

J. C. Landreth, as defendant's witness, testifies that he found posted on the Humbug claim a notice of location of the Cordell quartz mining claim, made September 15, 1897, by E. M. Payton, which having been introduced in evidence, J. C. Baisley admitted having written it, but claimed he did not post it where it was found, and intimated that it was put there by others. The testimony introduced by the defendant shows that along the boundaries of what is now insisted upon by plaintiffs as their mining claims the pine trees were blazed, and there was originally written thereon the word "Cordell," as indicating a quartz mining claim of that name, and that the resinous substance exuding from the trees covered such word, and over which was written the word "Independence," evidently of latter date. The defendant and his witnesses Emery and W. M. Proebstel, having seen the markings on these trees, testified that, in their opinion, the person who wrote the "Cordell" notice found by Landreth, posted on the Humbug mining claim, also inscribed on the pine trees adverted to the words "Cordell" and "Independence." J. C. Baisley, appearing as plaintiffs' witness in rebuttal, testified on cross-examination as follows: "Q. You don't know anything about the Red Bird notice, do you? A. No, sir; nothing about it. Q. You did put it up? A. I understand my son put it up. Q. You never put up the Red Bird location notice?

A. I have no recollection of it. Q. You didn't testify the other day that you put it up? A. If I remember right, I said my son put it up. Q. Did you ever hear of the Red Bird location before? A. I had several talks with him in regard to it, and he told me he had a location in there; that he himself had located another claim; and he told me that he had made some locations under the name of S. O. Baisley."

The *locus in quo* not being in an organized mining district, it was unnecessary, under the law then in force, to record a notice of location of a quartz mining claim; the limits of the boundaries thereof being sufficient, when they are definitely marked on the ground so that they can be readily traced: Rev, Stat. U. S. § 2324; Hill's Ann. Laws, § 3831; *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675). Plaintiffs having recorded copies of their notices of the claims designated as the "Independence" and the "Independence No. 2," it would be impossible, from an inspection of such notices, to determine with any degree of certainty the location of their alleged mining claims. If the testimony of J. C. Baisley is to be believed, however, the ambiguity of the notices, which places the claims about a mile apart, is removed, and the description rendered certain, by his declaration that he distinctly marked the location on the ground, so that their boundaries could be readily traced. He, as plaintiffs' agent and servant, performed some labor on these claims, it is admitted; but it may well be doubted if, at the time the work was done, the claims were held under the names specified in the notices as recorded. We think a careful examination of the testimony and exhibits will show that he, as agent of the plaintiff, E. M. Payton, was claiming the premises as the Cordell and the Cordell No. 1 when the notice of the Red Bird mining claim was posted, June 7, 1899, fixing one of its boundaries as coincident with the Cordell mine, when, if Baisley's testimony is true, it should have been the Independence, the notice of which was recorded March 13, 1897, or more than two years prior thereto. It seems improbable that he could have forgotten this fact, the force of which he sought to avoid in his cross-examination in re-

buttal by saying, in effect, that he had no recollection of posting the notice of location of the Red Bird, when on his prior cross-examination he stated that he had posted such notice. The fact that the word "Cordell," as marked on the pine trees on the boundaries of the claims in controversy, was covered with resin, and the word "Independence" written after the exudation had flowed over the former word, seems to afford indisputable evidence that the latter locations are sought to be substituted for the former. It will be observed that J. C. Baisley's statement concerning the location of the Red Bird mine is very contradictory, and, as the plaintiffs' right must depend upon his testimony, we think the maxim, *Falsus in uno, falsus in omnibus*, is properly applicable thereto. Believing that the claim to the premises under the names of "Independence" and "Independence No. 2" is a fabrication, it follows that the decree is affirmed.

AFFIRMED.

Decided 3 November, 1902.

STATE v. DEAL.

[70 Pac. 532.]

41	437
43	26
48	453

IMPEACHMENT BASED ON IRRELEVANT MATTERS.

1. Generally speaking, a party who has brought out irrelevant or immaterial testimony is bound thereby and will not be permitted to afterward contradict the witness on that subject, but there is no such restriction on the right of impeachment when the testimony is relevant, for example, where, in a prosecution for larceny of a horse, an issue is raised as to whether defendant purchased the animal from the complaining witness, questions asked the complaining witness on cross-examination as to his having stated to persons named that he sold the animal to defendant are relevant, and defendant is not bound by his answers, but may contradict him in the proper way.

FOUNDATION FOR IMPEACHMENT OF WITNESS.

2. Under Hill's Ann. Laws, § 841, providing that, before a witness can be impeached by evidence of inconsistent statements, such statements must be related to him, and he be permitted to explain them, a foundation for impeachment was laid where complaining witness, after testifying that he had traded three horses to defendant, but not the one in question, was asked if he had not, at a designated time and place, stated to a person named that he had traded the horse in question to defendant, to which he answered "No."

IDEM.

3. A foundation for impeachment was also laid when the complaining witness was asked if, at a designated time and place, he had not stated to a person named that he had traded four horses to defendant, to which he answered "No."

From Union: ROBERT EAKIN, Judge.

The defendant R. W. Deal was tried, convicted, and sentenced by judgment of the trial court for the crime of larceny by stealing a gelding, the property of one Charles Rowland. There was evidence introduced at the trial tending to show that the horse was brown in color, branded J D on the the left shoulder, about four years old, having white hind feet, and a cut or bruised knee. Charles Rowland, a witness for the state, testified in effect, that he was the owner of the animal; that he traded for it, when a yearling, with Eddie Masterson; that he never sold or disposed of it, and that the last time he saw it was in the spring, when it was in W. B. Campbell's pasture. As a defense, Deal claimed to have traded for the horse with Rowland about April, 1901, and that in the trade he obtained two J D horses, one being the gelding in question; also a sorrel saddle horse and a diamond dot mare,—four in all. On cross-examination, Rowland admitted that he had made a trade with Deal, but claimed that he let him have three horses only,—the sorrel saddle horse, the diamond dot mare, and a yearling colt, but neither of the J D horses, and hence not the gelding in question. Having stated that he was acquainted with William Brewer, he was further interrogated and answered as follows: "Q. Do you remember of meeting Mr. Brewer on the Foothill road along near the Shambaugh place some time last May? A. Last fall. Q. About last April? A. No, sir. Q. Don't remember meeting him there? A. No, sir. Q. Didn't you meet him at that time and place, you and he being there alone, about the last of April, and in a conversation with him tell him that you had traded your two J D horses to the defendant, Mr. Deal, here, or words to that effect? A. No, sir. I remember about riding along with him. But it seems like it was last fall. I was going over to

Price Gates' with him. Q. You was with him there, about the Shambaugh place, at one time? A. Yes, but there was another fellow along. Q. Who was the other fellow? A. Hornbeck. Q. Was Hornbeck present when you had any talk with him? A. He was riding along with him. Q. Isn't it a fact, in that conversation, that you and Brewer being there alone together, that you said to him, he wanting to trade, you having talked about trading horses, and you stated to him at that time that you had traded two J D horses to Mr. Deal, and two other horses? A. No, sir. Q. Do you swear to that positively? A. Yes." And, having testified that he was acquainted with Cleve Hopper, he was asked: "Q. Do you remember seeing him, going down with him from the new town to the old town, in La Grande, along about April last? A. Yes, I have done that a good many times. Q. Do you remember of going with him at that time from the new town to the old town, and in conversation with him, you and he being alone, you stated to him that you had traded four horses to Mr. Deal? A. No, sir; I never talked trading horses in my life with him."

For the purpose of contradicting Rowland, and showing that he had at other times made statements inconsistent with this testimony, Brewer was called, and testified that in the latter part of April, 1901, he was in company with him on the Foothill road, near the Shambaugh place, and had a conversation with him concerning the horses he then had and presently owned, whereupon witness was asked to state whether or not in that conversation Rowland said that he had traded two J D horses to defendant, or words to that effect. To this an objection was interposed and sustained, on the ground that the question was incompetent, because no proper foundation had been laid for impeachment. Following this an offer was made to show by the witness that Rowland stated, in the conversation referred to, that he had traded his two J D horses to R. W. Deal, the defendant, and that one of them had a lame or blemished knee, and this was refused. Later Brewer was again called, and asked whether or not, in the conversa-

tion with Rowland on the Foothill road, near the Shambaugh place, the latter part of April, referred to, he and Rowland, being alone, Rowland did not state to him that he had traded two J D horses to Mr. Deal, and two other horses, or words to that effect; and, not being permitted to answer, the offer was made to prove the fact indicated by the question, but without avail. Cleve Hopper was then called, and testified that he remembered seeing Rowland about the latter part of April, 1901, and going with him from the new town to the old town of La Grande, whereupon the further offer was made to prove by him that in a conversation then had with Rowland, they being alone, Rowland said that he had traded two head of horses branded J D, one of them being the horse involved in this case; but was not permitted to do so over the objection that no proper foundation had been laid for impeachment.

REVERSED.

For appellant there was a brief over the names of *Thos. H. Crawford*, and *Ivanhoe & Cherry*, with an oral argument by *Mr. Crawford*.

For the state there was a brief over the name of *D. R. N. Blackburn*, Attorney-General, with an oral argument by *Mr. Blackburn* and *Mr. Samuel White*. District Attorney.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The foregoing statement presents the only alleged errors relied upon for reversal. They involve but a single question, namely, was there a proper foundation laid for the impeachment of the prosecuting witness, Rowland? If there was, as respects either of the witnesses Brewer or Hopper, there was error for which a new trial should be awarded, and of this we will now inquire. Preliminarily, it is insisted that the subject-matter of inquiry is wholly irrelevant and immaterial to any issue in the case, and could not, therefore, form a basis for impeachment.

1. It is legally true that, when a matter immaterial and wholly irrelevant to the issue shall have been elicited from a witness, it concludes the party examining him; and he will not thereafter be permitted to impeach him by evidence showing that he has at other times made statements at variance or in disparagement of the testimony then adduced. This, however, does not extend to incompetent testimony merely because it is so, unless it may be said at the same time to be immaterial and irrelevant: *Joseph v. Furnish*, 27 Or. 260 (41 Pac. 424). But the testimony elicited from Rowland was not only competent, but perfectly relevant, and altogether material. There was an issue raised as to whether the defendant had not traded for or purchased the animal in question from Rowland, who was the owner at the time of the alleged theft. Rowland's attention was then called to the matter, and he testified positively that he did not trade either of the J D horses, or the animal in question, to the defendant. Now, it was with relation to this testimony that the attempted impeachment was pursued, and the effort was to show that the witness had at other times made statements inconsistent therewith. The testimony was, therefore, not foreign to any issue in the case, but altogether competent, pertinent, and relevant.

2. It is a statutory rule that a witness may be impeached by evidence that he made at other times statements inconsistent with his present testimony; but, before this can be done, the statements must be related to him, with the circumstances of time, place, and persons present, and he shall be asked whether he has made such statements or not, and, if so, allowed to explain them: *Hill's Ann. Laws*, § 841. This is but declaratory of the common-law rule, and the purpose of requiring the observance of the formality prescribed is for the protection of the witness, to give him an opportunity of recalling the facts and correcting the statements when immediately brought to his attention. When, however, the statements are called to his mind, together with such circumstances of time, place, and persons present as to enable him to readily understand the particular statements alluded to by the questioner, and he then

denies making any, or attempts to qualify them, other persons having knowledge of the fact may be called to contradict him : *Sheppard v. Yocum*, 10 Or. 402; *State v. Welch*, 33 Or. 33 (54 Pac. 213); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167). Now, as it pertains to the statement or admission made to Brewer, Rowland denied it *in toto*. He recalls, however, that he was with Brewer at the place designated, but is not certain as to the time, thought it was in the fall; and that another person, one Hornbeck, was also present. So that he does not agree in his recollection entirely as to the circumstances indicated by the interrogator. But this is because he remembers them differently, or does not care, for some reason, to state them truly. This circumstance does not, in any sense, stand in the way of laying a proper foundation for impeachment, the essential conditions being that the witness' attention be so definitely attracted, in the manner designated, to the exact conversation or statement supposed to have been had or made that is in the mind of the questioner, so as to give him an opportunity to affirm or deny, or to explain by relating it as his memory bears him out. We think the foundation was well laid, for the impeachment by the testimony of the witness Brewer, whose attention was directed to the circumstances of time, place, and persons present in like manner as Rowland's attention was called thereto, and he was asked whether or not Rowland had stated to him, in the supposed conversation, that he had traded his two J D horses to defendant, Deal, or words to that effect, and he was not allowed to answer. This was followed by an offer to prove the statement in a little different form, which, if objectionable, was afterwards cured by an offer to show by the witness that the statement was made to him by Rowland in the identical language employed in the interrogation addressed to the latter.

3. The attempted impeachment by Cleve Hopper has, perhaps, not so good a basis. He was asked, touching the supposed conversation, whether Rowland stated that he had traded four horses to Mr. Deal, instead of three. If permitted to answer, however, it would have had some tendency to im-

peach Rowland touching the matter in issue, and should have been allowed to go to the jury. We do not desire to be understood as holding that the matters offered to be proved by witnesses Brewer and Hopper were, in any sense, substantive evidence, admissible for the purpose of showing title in the defendant, but have considered only the question as to whether the proper foundation had been laid for the impeachment of the witness Rowland. It was very important to the defendant that he should have been allowed to discredit the only witness who was in a position to dispute his contention that he had traded for the horse, and was, therefore, the owner at the time of the alleged larcenous taking; and he was entitled to have the testimony go to the jury for their consideration in arriving at a verdict. The judgment must, therefore, be reversed, and remanded for a new trial.

REVERSED.

Decided 16 June, 1902; rehearing denied.

OLIVER v. HUTCHINSON.

[60 Pac. 139, 1024.]

BEST EVIDENCE—ORAL TESTIMONY—JUDICIAL RECORDS.

1. Facts that are contained in judicial records may sometimes be proved by parol, depending on the purpose for which the facts are to be used: for example, a party wishing to show that a certain arrest had been made at the instigation of a particular person, may offer the oral testimony of witnesses who know the facts.

TRESPASS—COMPETENT EVIDENCE OF DAMAGE.

2. In an action for damages for trespass committed by cattle, evidence of the value of the land for pasture purposes, and as to the shrinkage of the hay crop by the pasturing of defendant's stock thereon, was competent.

INSTRUCTIONS SHOULD NOT BE INDEFINITE.

3. Where plaintiff's and defendants' land was in one inclosure, and plaintiff undertook to construct a partition fence, but was prevented by defendants, who claimed that he was building the fence on their land, and not on the line, an instruction that, if he attempted to erect a partition fence on the line between his and defendants' land, "or approximately so," and was prevented by defendants, they would be liable for any damage he suffered on account of the trespass of their stock, was error, for it left the construction of the word "approximately" to the jury.

TRESPASSING CATTLE—PARTITION FENCE.

4. Hill's ANN. LAWS, § 3445, providing that all fields and inclosures (with a certain exception) shall be fenced, does not apply to exterior fences only;

so that a plaintiff, whose lands are fenced in a common inclosure with defendants' lands, cannot recover for trespass of defendants' cattle, not having separated his lands from theirs by a fence, in the absence of malicious prevention by defendants.

From Union: ROBERT EAKIN, Judge.

This is an action by Turner Oliver against J. H. and W. R. Hutchinson to recover damages for the trespass of defendants' stock upon improved agricultural land of which the plaintiff was the lessee. The complaint alleges, in substance, that the land of plaintiff was inclosed; that, in the years 1899 and 1900 the defendants willfully, and without right, and against the consent of the plaintiff, turned in and upon his land horses and cattle, which ate up and destroyed the grasses, grain, and herbage growing thereon, and otherwise injured the land, to his damage in the aggregate sum of \$800. The answer denies the material allegations of the complaint, and alleges affirmatively that plaintiff's land was inclosed with that of the defendants; that defendants turned their stock on their own land, and for want of a partition fence they wandered over and upon the land of the plaintiff; that the defendants were at all times ready and willing to erect and maintain one half of a lawful partition fence, but plaintiff refused to build or maintain any portion thereof. Upon the trial the plaintiff had a verdict and judgment for \$375, and defendants appeal, assigning error in the admission of testimony and in a certain instruction to the jury. REVERSED.

For appellants there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief over the name of *Thos. H. Crawford*, with an oral argument by *Mr. Turner Oliver*, in *pro. per.*, and *Mr. Crawford*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

In the years 1899 and 1900 plaintiff was the lessee and in possession of 140 acres of land, inclosed with 600 acres belong-

ing to the defendants. In October, 1899, he attempted to construct a partition fence between the two tracts, but his employes, while so engaged, were arrested at the instigation of the defendants for trespassing upon inclosed land, and he was prevented, as he alleges, from completing the fence, for the want of which defendants' stock was permitted to graze and feed upon his land, to his damage as alleged.

1. The first assignment of error is based upon the admission of oral testimony tending to show the arrest of plaintiff's employes while constructing the fence. The argument is that the record in the criminal proceedings for an unlawful trespass was the best evidence, and should have been procured and offered by the plaintiff. The oral testimony was not admitted, however, for the purpose of proving the legality of the proceedings, but to show the fact of the arrest, that it was at the instigation of the defendants, and that by reason thereof plaintiff was prevented from constructing the fence. For this purpose the evidence was competent, and the production of the record not necessary.

2. It is next urged that the court erred in admitting evidence as to the extent of the plaintiff's damages. He and others testified as to the value of the land for pasture purposes, and as to the shrinkage of the hay crop of 1900 by the pasturing of defendants' stock thereon. These facts were necessary to enable the jury to intelligently estimate the damages, and, as the testimony in no sense invaded its province, it was competent. The court instructed the jury that, if plaintiff attempted to erect a partition fence on the line between his and the defendant's lands, "or approximately so," and was prevented by the acts or threats of the defendants, they would be liable for any damages that plaintiff suffered on account of the trespass of their stock; otherwise he could not recover. There was a controversy between the parties as to the true location of the line dividing their respective premises. The defendants testified, in effect, that the line was established in 1866, and a fence built thereon at the time; that there was a high place or ridge where the old fence stood, and that plaintiff's employes at the time of their arrest were attempting to build

a fence from six to ten feet west of this ridge, and on defendants' land. The plaintiff, on the other hand, contended, and gave evidence tending to show, that the old ridge was not the true line, but that it was from six to ten feet west thereof, and at the place where his employes were engaged in building the fence when they were arrested. In view of this condition of the testimony, it is insisted that the instruction as given was erroneous, because it did not confine plaintiff's right to build the fence on the true line, or on his own side thereof, and, although plaintiff may actually have been engaged in constructing a fence on the defendants' land, and therefore a trespasser, the defendants would be liable if the jury found that the fence was approximately on the line. This criticism is, in our opinion, well taken. Plaintiff had no right or authority to construct a fence on the premises of the defendants, and it is a matter of no consequence whether he was ten feet or only one foot over on their land. As a matter of fact, there was a distance of only from six to ten feet between the lines contended for by the respective parties, and under this instruction it was practically left to the jury to determine whether a fence constructed on the line contended for by the plaintiff, if not the true line, would be approximately so; in other words, the jury could have found that as a matter of fact the line was as contended for by the defendants, and that plaintiff's employes were engaged in building a fence six feet over on their land, and yet have found a verdict in favor of the plaintiff, if, in its opinion, the proposed fence was "approximately" on the true line. "Approximately" simply means "nearly" or "closely;" so the jury could properly have found that the proposed fence was on the defendants' land, and yet, under the rule of law as given, they would be liable. The true location of the boundary line was evidently an important feature in the case, and it would have been no proof of the cause of action alleged in the complaint if the plaintiff was arrested or prevented from building the fence any distance whatever from the line and on the defendants' land. The instruction as given was not a definite and certain guide to the jury, but left

it to determine what would satisfy the requirement that the fence must be approximately on the true line.

Because of the error in the instruction given the judgment must be reversed, and a new trial ordered. REVERSED.

Decided 25 August, 1902.

ON PETITION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

4. The plaintiff now makes the point that the erroneous instruction referred to in the opinion was harmless error, because he was under no obligation to fence against the stock of the defendants, but they were bound to keep it on their own land, and, if they failed to do so, would be liable in damages for the trespass whether the plaintiff's land was fenced or not; in other words, his position is that, as it pertains to the land of several parties inclosed with one fence, the common-law rule prevails, and each owner must at his peril keep his stock off of his neighbor's land. The statute (Hill's Ann. Laws, § 3445,) provides that all fields and enclosures, except in what was known as Umatilla County in 1872, shall be fenced with a certain kind of fence, and in *Campbell v. Bridwell*, 5 Or. 311, it was held that this statute, where applicable, repealed the common-law rule whereby the owner of domestic stock was made liable for an injury done by it to the uninclosed land of another. And there is no reason, so far as we can see, why the statute should be construed to apply to exterior fences only. It makes no distinction between exterior and division fences, but requires all fields to be inclosed with a fence; and, under the decision referred to, if the landowner would have a remedy for the trespass of stock he must inclose his land, unless, of course, as the plaintiff attempted to show in this case, he was prevented from doing so by the wrongful act of the owner of the stock. The statute of Indiana, under which the decision principally relied on by the plaintiff (*Myers v. Dodd*, 9 Ind. 190, 68 Am. Dec. 624,) was made, differs materially from our statute. It simply defines what shall con-

stitute a lawful fence, and then provides that the owner of domestic animals shall be liable for damages done to the land of another unless inclosed by such a fence: 1 Rev. Stat. Ind. 1852, p. 292. But there is no provision that all fields shall be so inclosed, and the courts of that state have held that the common-law rule prevails except as to exterior fences. The petition for rehearing is denied. REHEARING DENIED.

Decided 16 June, 1902.

MARTIN v. EAGLE DEVELOPMENT CO.

[69 Pac. 216.]

VERITY OF RECORD IS PRESUMED.

1. An objection that the court erred in rendering a decree without proof of any of the material allegations in the complaint denied by the answer is untenable where the findings of fact recite that they were made from "the admission of the pleadings and the evidence taken," since such recital imports verity and precludes inquiry.

ELEMENTS OF CAUSE OF SUIT FOR FRAUD OR DECEIT.

2. To sustain a suit based on fraud or deceit it must appear that there were false representations of material import concerning the subject-matter of the contract, made by the other party with knowledge of their falsity, or made as of his own knowledge, not knowing whereof he spoke, for the purpose of misleading and deceiving, and such representations must have been relied upon, to the injury of the deceived party.

FRAUD—INSUFFICIENT PROOF OF DECEPTION.

3. Where a purchaser of mining property alleged fraud in the vendor's representations that he was the owner of a certain number of inches of water in a certain creek, and had made a valid and indefeasible location thereof, but it appeared that immediately after the purchase the purchaser relocated the water claimed by the vendor,—its notice reciting that the same had been sold to the purchaser,—it was apparent that the purchaser knew the interest owned by the vendor, and hence was not misled.

JUDICIAL NOTICE OF MEANING OF WORDS.

4. Under Hill's Ann. Laws, § 708, subd. 1, providing that courts shall take judicial notice of the meaning of all English words and phrases and all legal expressions, such notice will be taken only of the ordinary meaning of current words and phrases; and, if an unusual meaning is sought to be attached to words used in pleadings, such meaning must be explained. The following illustrates this: Defendants alleged fraud in the sale of mining property in that plaintiffs falsely represented that the land would yield gold not less than ten cents per yard "from the grass roots down," and that plaintiffs had "prospected" the land and knew the value thereof. *Held*, that, as the expression "from the grass roots down" ordinarily means to the center of the earth, and not merely to bedrock, and as "prospected" ordinarily means to do experimental work to ascertain the probable value of a mining claim, and not

to accurately ascertain the actual value by sinking holes to bedrock and testing the earth, plaintiffs' alleged misrepresentations were apparently mere expressions of opinion, and not statements of fact, and if any other meaning attached to the expressions used, it should have been pleaded.

FRAUDULENT REPRESENTATION—KNOWLEDGE OF MAKER.

5. Where defendant alleged that plaintiffs on sale of mining property were guilty of fraud in representing that a certain ditch could be constructed for a certain sum, and that plaintiffs, after the sale, undertook to construct the ditch for the amount for which they represented it could be done, and failed, but there was no showing that plaintiffs' entered on the work without intending to complete it, or knew that it could not be done for the price they had named, it was not made to appear that plaintiffs' statement as to the cost of the ditch was made with knowledge of its falsity.

MORTGAGEE'S NOTICE OF PRIOR EQUITABLE CLAIM.

6. Plaintiffs sued to recover mining property which they had conditionally sold to defendant company under a contract providing that certain improvements should be made. A mortgagee alleged that his mortgage was for money loaned to the company to make the improvements under the provisions of the contract. *Held*, that, if it was loaned for this purpose, the mortgagee must have known of the contract and its conditions, and must therefore have taken subject to plaintiffs' rights thereunder.

CORPORATIONS—PRESUMED KNOWLEDGE OF STOCKHOLDERS—ESTOPPEL.

7. Plaintiffs were stockholders in a corporation, and had a claim on certain property of the corporation which they had sold to it. The corporation mortgaged the property, the mortgagee having notice of plaintiffs' claim. *Held*, that in the absence of any showing that plaintiffs were present at the stockholders meeting where the mortgage was authorized, or actually consented thereto, the mere fact that they were stockholders did not estop them from asserting their rights under the contract.

From Union: ROBERT EAKIN, Judge.

On November 18, 1897, the plaintiffs, Killis J., Oliver, G. M., and Nellie Martin, of the first part, and the Eagle Creek Development Co. of the second part, entered into an agreement whereby the parties granted the Development Company an option to purchase certain mining claims for the consideration of \$16,000, of which \$4,000 was paid down, and also granted with said option the right and privilege of prospecting, exploring, and mining the same until the 15th day of December, 1897, at which time, if the company so desired, the right and privilege should be extended to the 20th day of December, 1898, upon the payment of an additional \$4,000, at which latter date the balance of \$8,000 should be paid if the company elected to purchase. The company agreed to commence the

work of exploration and development of the mining property within a reasonable time, and to construct a sluicing ditch for the purpose of conveying the water from Eagle Creek to the claims, to be used in hydraulic mining, and to complete said ditch, ready for operation, not later than July, 1898. It was further provided that, upon payment of the additional \$4,000, the completion of the sluicing ditch, the installment of a No. 3 giant for hydraulic mining, and the setting of pipes to connect the same, the Martins should execute a bond for a deed for the further protection of the Development Company, and that, upon making all the payments as stipulated for, they should make, execute, and deliver to the Development Company a deed conveying a perfect title to said mining claims (except the fee simple of the United States), and also a good and sufficient conveyance of title to all the water rights filed on by them on Eagle Creek and its tributaries. As a further consideration for such option, the Development Company agreed to cause to be issued to the Martins one sixteenth of the capital stock of the company on or before January 1, 1898. It was further agreed that the Development Company might decline to make any of the payments designated, when due, upon the surrender of the contract, and that time was of the essence of the agreement. Thereafter the agreement was so modified as to extend the time of final payment to November 1, 1899. A deed was executed and delivered to the Development Company to the water rights on the same day, and at once recorded. Subsequently the company entered into possession of the mining lands and the water rights, and built and constructed a sluicing ditch,—the same, it is alleged, as was intended to be constructed under the contract. The company also installed a No. 3 giant, set pipes to connect the same with the ditch with the view to hydraulic mining, and completed the plant, and performed considerable labor and development work. These matters are alleged in the complaint, and it is further averred that, although plaintiffs have complied with all the conditions of the agreement on their part, the Development Company has made default, and has failed and refused

to make any payments as stipulated for by the agreement, except the first, and that was made by note, which is wholly unsatisfied; that the company abandoned the property, and the same, including the water rights, ways, ditches, as well as all improvements, betterments, etc., were left unattended and uncared for, whereupon plaintiffs duly notified the company of their intention to declare the contract forfeited, and subsequently took possession of all said property. It is further alleged that the company executed a mortgage to Lewis A. Hall upon the ditch and water rights, which is an apparent lien upon the property described in the contract, and that he took the same with notice and knowledge of plaintiffs' rights, and that the other defendants claim an interest in the property, wherefore plaintiffs pray a forfeiture of the contract; that the sluicing ditch and improvements be deemed to have been constructed and made for their benefit, and they be declared to be the owners thereof; that the mortgage and conveyances mentioned be declared to be clouds upon their title; and for other relief.

All the defendants seem to have answered, admitting the agreement, but denying substantially all the allegations of the complaint, except the execution of the mortgage to Hall and a deed to Anderson Finley; and, for a further and separate defense, it is alleged, in effect, that in the summer of 1897 Killes J. and G. M. Martin pretended and represented that they, the said Martins, were the owners of 2,000 miners' inches of the water of Eagle Creek; that they had made a valid and infeasible location, and had the right to appropriate the same or to transfer it, and did at the same time pretend and represent, that said mining claims were very rich in gold bearing mineral, if worked as placer mines with hydraulic appliances; that they would yield in gold not less than ten cents per yard of earth from the grass roots down, and from one end of said claims to the other; that Killes J. Martin was an old and experienced miner, had thoroughly prospected and examined said claims, and knew what he was talking about, and that what he said about their richness could absolutely be relied

upon; that the said representations were made with the purpose of inducing the sale of the property; that plaintiffs did further represent and pretend that it would be necessary, in order to properly mine and work said placer ground, to construct a ditch or flume some three or four miles in length to conduct the water thereto from Eagle Creek; that they were experienced ditch builders, and that such a ditch, sufficient to carry 5,000 inches of water, could be constructed for a sum not to exceed \$4,000; and that they would, if the sale could be effected, undertake to construct it for that sum; that plaintiffs assured the company, through its agents, that said representations were true, and thereupon the Eagle Creek Development Co. incorporated for the express purpose of purchasing said placer property, and working and mining it for gold; that, having no knowledge of mining, or the richness or the value of said property, or the cost of said ditch, but believing and relying on the representations of the plaintiffs, the Development Company entered into a contract with them as set out in the complaint; that plaintiffs knew at the time that said representations were false, and made for the purpose of cheating, overreaching, and defrauding the Development Company; that upon the signing of the contract the Development Company discovered that Killes J. and G. M. Martin were not the owners of 2,000 inches of the water of Eagle Creek, and that the only claim they had thereto was based upon a defective and wholly insufficient notice of appropriation recorded in Union County, whereupon the company was obliged to, and did, make a location of water for itself, and did on November 18, 1897, relocate the said 2,000 inches of water so pretended to be located by said Martins, and, in addition thereto, did locate and appropriate of the water of Eagle Creek 5,000 inches in addition, and did at the same time file a notice of the pre-emption of the right of way for said ditch. The notice recites, among other things, that said company "claims and has a valid right to the enjoyment and use of 7,000 inches of water, miners' measure, under a six-inch pressure, to be conveyed through said ditch or flume to the placer mining

grounds situate at the junction of Eagle Creek with East Eagle Creek, together with, all and singular, the appurtenances, which notice is intended to cover an appropriation of 2,000 inches of water, which appropriation was made by Killis J. and G. M. Martin on May 8, 1897, and which water right has this day" (November 18, 1897) been sold and assigned to the company, and also 5,000 inches additional, to be devoted and used as indicated.

Continuing, it is further alleged that the company acquired from the United States the right of way of said ditch through the public domain, and entered into a contract with Killis J. and Oliver Martin to construct said ditch for the sum of \$4,000, but that they failed to perform their obligation, and the company completed the same at an expense of \$16,000; that plaintiffs are stockholders in said company; that, owing to their failure to construct said ditch, it became necessary to carry on and complete the work; that after its completion the company prosecuted systematic and thorough mining operations on said claims, but was unable to secure gold enough to pay the expenses of taking it out of the ground, and that gold does not exist in said claims in sufficient quantities to pay for extracting the same; that the company, in building said ditch and making the improvements mentioned, expended \$25,000; that the defendant and Anderson Finley are the exclusive owners of the ditch, giant, pipes, tools, appliances, and buildings, subject to the mortgage of Lewis A. Hall; that the company is ready and willing to release and turn over to the plaintiffs all interest in the claims described, except the right of way to said ditch, buildings, and improvements; and that, by reason of the false and fraudulent representations of the plaintiffs, the company was induced to enter into said contract, and to construct said ditch and make the improvements mentioned, to their great damage in the sum of \$28,000.

And the defendant Clarence Cole for a separate answer, alleges that the Development Company entered into a contract with the Martins as alleged in the complaint, and, as a part consideration, agreed to issue and deliver to plaintiffs one six-

teenth of the entire capital stock of the company, which was accordingly done, and the stock received and accepted, and is owned and held by them; that in the construction of the ditch contemplated, and the purchase of tools, machinery, etc., the company was obliged to, and did, expend large amounts of money, and that, to supply the necessary means to carry forward the work under the provision of the contract, Lewis A. Hall advanced from time to time, ranging from April 10, 1898, to November 22d, money aggregating \$15,560.61, to enable it to carry on said work, and perform the terms and conditions of said contract with the plaintiffs; that at a regular annual meeting, of which all the stockholders had due and legal knowledge, by resolution duly adopted the company was authorized to execute a note for the sum mentioned to said Hall, and a mortgage upon the property to secure the same, which was accordingly done in November, 1898. Then follow appropriate allegations of recording, assignment to Cole, and default in payment; and it is further alleged that Hall made the loan and took the mortgage without notice or knowledge of the conditions of said contract; that plaintiffs knew the purpose for which said mortgage was given, and made no objections, but consented thereto, and received the benefits thereof in proportion to their interest in said corporation under the contract. The defendants pray that Anderson Finley be declared to be the owner of all the property described in the complaint, except the placer claims, for \$28,000 damages, and for a foreclosure of the Hall mortgage. A general demurrer was interposed and sustained to each of these separate answers, and, the defendants refusing to answer further, a decree was entered in accordance with the prayer of the plaintiffs, and the defendants appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. O. B. Mount*.

For respondents there was a brief and an oral argument by *Mr. Charles E. Cochran*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The defendants counsel insist preliminarily that the trial court erred in rendering a decree for the plaintiffs in the absence of any proof to support any material allegations of the complaint denied by the answer. It is, however, not conceded by opposing counsel that no evidence was taken at the trial. None has been brought up, but we find the following recital in the record, prefacing the findings of fact: "and now, from the admission of the pleadings and the evidence taken before the court and filed in this suit, the court finds,"—which indicates the basis for the court's action. The recital precludes further inquiry upon the subject. The record imports verity, and we cannot look behind it and say that the decree was rendered without proof sufficient to support the disputed allegations of the complaint.

2. The next contention is as to the sufficiency of the first separate defense, which is based upon fraud and deceit. As essential elements to sustain it, there must have been false representations of material import concerning the subject-matter of the contract, the plaintiffs knowing them to be false, or representations as of their own knowledge, not knowing the truth whereof they spoke, for the purpose of misleading and deceiving the Development Company; and the company must have relied upon such representations, believing them to be true and was misled thereby to its injury: 7 Am & Eng. Ency. Law (1 ed.), 12, 17; *Rolfes v. Russel*, 5 Or. 400; *Bullit v. Farrar*, 42 Minn. 8 (43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485).

3. The first representation relied upon as being false is that the Martins were the owners of 2,000 miners' inches of the water of Eagle Creek; that they had made a valid and infeasible location, and had the right to appropriate the same and transfer it. Further averments in the answer, however, disclose the fact to be that the Development Company must have known and did know the exact interest the Martins owned in the alleged water right at the time, for it posted and and

had recorded at once a notice relocating the 2,000 inches that plaintiffs claimed; reciting that appropriation had been made thereof by them, and that the same had been sold and assigned to the company. With such knowledge, it could not well assert that it was deceived by the representations of plaintiffs, whatever might have been their falsity. It was not misled thereby, nor induced to act to its detriment, because it was fully advised to the contrary.

4. The next consists in the representation that the mining claims were very rich in gold; that if worked as placer mines, with hydraulic appliances, they would yield in gold not less than ten cents per yard from the grass roots down, from one end of the claim to the other; that one of the Martins had thoroughly prospected and examined the claims; and that what he said could be relied upon; and these representations are alleged to have been false, to the knowledge of the plaintiffs. But the latter combat the contention that these are sufficient upon which to base the defense, with the suggestion that the representations consist in mere matters of opinion, and must be so construed. But whether that be so or not, there is a vital defect in statement in two particulars. In support of the answer the Development Company insists that the expression "from the grass roots down" means, in mining parlance, from the grass roots to the bed rock, and that it was so understood by miners; and that the term "prospected," as applied to placer mines, signifies that holes have been sunk to the bed rock, and a test made of the earth in each, and the average ascertained. If such are the significations of the expression and the term, unless they are such as ordinarily attach thereto, they should have been explained, to make them intelligible. Judicial notice will be taken of the true signification of all English words and phrases and all legal expressions: Hill's Ann. Laws, § 708, subd. 1. It is the ordinary meaning of current words and phrases to which the notice extends: 17 Am. & Eng. Ency. Law (2 ed.), 896: *Nix v. Hedden*, 149 U. S. 304 (13 Sup. Ct. 881). The expression, "from the grass roots down," in its ordinary or literal sense means

to the center of the earth, and that is as far as judicial notice can be expected to extend. If it has a peculiar signification; peculiar to a locality or to a particular industry; different from the ordinary one,—of this the court will not take notice. “To prospect” signifies “to explore for unworked deposits or ore, as a mining region;” “to do experimental work upon, as a new mining claim, for the purpose of ascertaining its probable value”: Century Dict. This is the common or current acceptance of the term. That it means what counsel would ascribe to it is foreign to such an acceptance, and we cannot be expected to take judicial notice that it has such a meaning. So that, if the meanings defendants ascribe attach to the phrase and word under discussion, they should have made them understood by appropriate allegations; otherwise the answer does not state a cause of defense within the cognizance of the court, and is therefore deficient in that particular.

5. The next alleged representation pertains to the cost of constructing the ditch, but it appears that plaintiffs were willing to undertake the work of construction for \$4,000,—the same amount they represented it could be done for,—in which undertaking they failed, and the Development Company took up the work and completed it at a much greater cost. It does not appear that plaintiffs entered upon the work without intending to complete it, or that they knew that it could not be done for the sum named, so that a false representation, knowing it to be false, cannot be imputed from the fact. This disposes of the questions presented as to the first separate defense, and, being in harmony with the action of the trial court, it follows that the demurrer thereto was properly sustained.

6. The separate answer of the defendant Cole depends for its sufficiency upon whether it shows that Hall took the mortgage *bona fide* and without knowledge of plaintiff's equities. The plaintiffs had executed and delivered to the Development Company a deed to their water rights, and this was regularly placed on record, so that, according to the record, the Develop-

ment Company appeared to be the owner. The deed was executed in pursuance of the contract entered into between plaintiffs and the company for the purpose of aiding the latter in doing the work contemplated by the contract if it desired to proceed under the option thereby accorded. It is alleged, in effect, that to supply the necessary means, and to enable the company to carry forward the work under the provisions of the contract, Hall advanced the money; being the same for which the mortgage was given. Now, if he advanced it for the purpose designated, he must have known of the contract, and consequently of its terms and conditions, and hence that whatever rights or interest in the property he has acquired by virtue of the mortgage are subordinate to the equities of the plaintiffs. The answer, therefore, does not show him to have been an innocent purchaser, but quite to the contrary.

7. There is another contention in this connection,—that plaintiffs were stockholders in the Development Company, and, having had notice of the meeting at which the mortgage was authorized, they were estopped to deny Hall's alleged superior equities. It does not appear that any of the plaintiffs were present at such meeting and participated in or assented to the execution of the mortgage of the company. The mere fact that they were stockholders does not estop them to insist upon their rights under the contract, the interest of Hall having been acquired with notice of such rights.

The demurrer to this answer was, therefore, also properly sustained; and having now disposed of all the questions presented, favorably to the respondents, the decree of the trial court will be affirmed.

AFFIRMED.

Argued 23 July; decided 11 August, 1902.

WILSON v. WILSON.

[69 Pac. 923.]

MANNER OF URGING DEFENSE OF LACHES—DEMURRER.

1. The question as to whether a claim or demand is too stale to form the basis of a suit in equity may be raised by demurrer where the complaint shows the requisite facts.

EQUITY—WHEN LACHES IS A DEFENSE.

2. Where, through the *laches* of a complainant in equity, it has become doubtful whether defendant can command the evidence necessary for a fair presentation of his case, or defendant has been deprived of any advantage which he might have had, or will be subjected to any hardship that might have been avoided, if the suit had been seasonably instituted, equity will not grant relief, though the full limitation applicable to a remedy at law may not have expired.

EXAMPLE OF LACHES.

3. Two years after the death of one of two partners his foreign administrator sued the surviving partner within this state on notes previously executed to deceased in settling firm business. Defendant (plaintiff here) attempted to set up equitable defenses by way of answer, but made no attempt to avail himself of them by way of cross bill, as he could have done, and judgment went against him. Subsequently his land was sold under the judgment, and purchased by the administrator as such, and still later a domestic administrator appointed for deceased sold the land so purchased by the foreign administrator, and defendant (present plaintiff) purchased it. None of the partnership assets, except the notes, were accounted for to the administrators; the surviving partner remaining in possession of them. Ten years after decedent's death, and after the the administrators had applied most of decedent's personal assets upon his debts, and had practically settled his estate, the surviving partner sues for an accounting, and seeks the benefit of his equitable defenses to the notes, alleging further that his deed from the domestic administrator is void, and seeking to impress a trust upon the land. *Held*, that the claim is barred by laches.

From Douglas: JAMES W. HAMILTON, Judge.

This is a suit by W. C. Wilson and wife against Geo. W. Wilson, personally and as administrator, and Geo. M. Brown, as administrator.

The complaint alleges, in substance, that plaintiffs are husband and wife; that prior to November, 1888, and until May 3, 1895, plaintiffs were the owners in fee of 1,608 acres of land, situated in Douglas County, Oregon, particularly describing the same; that plaintiff W. C. Wilson, and defendant George W. Wilson are brothers, and the sons of Daniel Wil-

son, deceased; that prior to May, 1888, W. C. and Daniel were stockholders in the Green Mountain Mining Co., a private corporation, and together owned more than half of the capital stock thereof; that the corporation was the owner of a quartz mining claim situated in Douglas County, but not upon the said lands of plaintiffs; that on or about May 22, 1888, W. C. and Daniel entered into a copartnership, for the purpose of leasing and working the claim for their own advancement and benefit, and then and there agreed with each other upon the following terms, namely, that W. C. should procure a lease from the company, take possession thereof, and work the claim and attend to it, direct, manage, and supervise the operation of the same in extracting gold therefrom; that Daniel should advance from his private funds such sum or sums of money from time to time as might be necessary to purchase tools, machinery, and supplies, pay for labor, and defray other expenses in operating the mine, which money, so advanced, was to be expended by the copartnership, and repaid to Daniel out of the clear profits of the venture; and that the profits remaining after paying such advances and the losses incurred in operating the business should be divided and shared equally between the partners; that in pursuance of the agreement, W. C. procured the lease of the mine for the copartnership, entered into possession, managed, and supervised the opening, improving and working thereof, and continued so to do until the death of Daniel, November 14, 1890; that prior to November 30, 1888, Daniel advanced \$1,800, and subsequently, on or about December 23, 1888, advanced \$580, aggregating \$2,380, all of which was expended in the operation of said mine, in accordance with the copartnership agreement; that the copartnership expended and incurred liabilities in working and operating said mine far in excess of the moneys advanced by Daniel; that on or about said November 30, 1888, Daniel, being desirous of withdrawing his personal attention from the business, and removing to the State of Washington, requested plaintiff to assume the entire responsibility of operating the mine, and to collect and remit to him the net profits of the

business, applicable to the repayment of the amount so advanced, and to secure the payment of the same by the promissory note of the plaintiffs; that W. C. acceded to such request, and thereupon with his wife, executed and delivered to Daniel their promissory note for said claim of \$1,800, payable three years after date, and on December 23, 1888, executed a second note for \$580, payable in one year; that the sole and only consideration for said notes was the money expected to be realized from the business of the copartnership over and above the operating expenses, and the amount thereof applicable to the reimbursement of Daniel for the advances made; that W. C. operated said mine skillfully and prudently, but at a loss far in excess of said advances, without at any time realizing any profit applicable to the payment or discharge of said promissory notes, or either of them, whereby the consideration thereof wholly and entirely failed; that such copartnership continued until the death of Daniel, and no settlement of the accounts and business has ever been had with him, or any representative of his estate; that the copartnership property is undisposed of, and that upon a full and final accounting a large amount of money will be found due W. C. from the estate of Daniel; that Daniel died in the State of Washington, and on December 19, 1890, the defendant George W. Wilson, was appointed administrator of his estate in that state; that on December 23, 1892, he, as such administrator, instituted an action upon each of said notes in the circuit court for Douglas County in this state, and that plaintiffs appeared and filed their answer in each of said actions, which were adjudged insufficient, because equitable in their nature, and did not constitute a defense at law, whereupon judgments were given and rendered against them; that on September 19, 1893, he caused executions to issue, and certain personal property of W. C. to be sold; that later, on February 1, 1894, he caused *alias* executions to issue, and the aforesaid real property to be sold to satisfy the same; that George W. Wilson, as such administrator, became the purchaser, and subsequently, on or about May 3, 1895, obtained a sheriff's deed therefor; that on

April 22, 1897, upon the application of George W. Wilson as administrator, the defendant George M. Brown was, by the county court of Douglas County, appointed administrator of the estate of Daniel in and for the State of Oregon, to whom letters of administration were duly issued; that Brown, assuming to act as such administrator, and after obtaining a license therefor, sold the land so purchased by George W. as administrator to satisfy the claims against the estate in the State of Washington, and that W. C. became the purchaser thereof at such sale for the sum and price of \$1,600, which sum he paid to Brown as such administrator, and subsequently received a deed in pursuance of such sale from said administrator; that the legal title to said lands was in George W. personally, and not in the estate of Daniel, and that by reason thereof the sale to W. C. was null and void; that Brown, as administrator, has remitted to George W. Wilson, administrator in the State of Washington, a part of said sum of \$1,600, and threatens to remit the balance, consisting of \$250, unless restrained; that George W. threatens to, and will, unless restrained, transfer the legal title to all of such lands to some innocent purchaser, and thereby prevent plaintiffs from enforcing their equitable title thereto, to their irreparable injury; that defendants have had notice at all times of the equities of plaintiffs, as herein set forth, and that plaintiffs have been ever since May 1, 1888, and now are, in the open, notorious, actual, and exclusive possession and occupation of all of said premises, claiming title as against all persons whomsoever, and that George W. claims and asserts some right or interest therein adverse to plaintiffs. The prayer is for an accounting between the plaintiffs and defendants relative to the copartnership business; that George W. be declared to be the trustee of the legal title to the real property for the use and benefit of the plaintiffs, that he be directed to execute and deliver to plaintiffs a good and sufficient deed conveying the legal title thereto; and that he be enjoined from the enforcement of the said judgments, and for such other relief as may seem proper in equity. To this complaint a demurrer was inter-

posed and sustained, and, plaintiffs refusing to plead further, a decree was rendered, dismissing the suit, from which they appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Commodore S. Jackson*, and *Mr. Edw. B. Watson*.

For respondents there was a brief and an oral argument by *Mr. J. C. Fullerton*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. This is essentially a suit for an accounting and settlement of copartnership affairs by the surviving partner against the administrator of a deceased partner, and was instituted upon the hypothesis that equity has jurisdiction to grant relief. The defendants insist, however, that it has not, but that the county court is invested with the exclusive jurisdiction in the premises. In the view we have taken of the controversy, however, it may be conceded that equity has the requisite authority,—a matter we do not pretend to decide,—and yet it does not follow that plaintiffs have a cause of suit, as it is further insisted that the claim or demand sued upon is stale, and that it would be inequitable to permit them to pursue it at this time. This question may be raised by a demurrer, if the complaint shows the requisite facts upon its face: *Bell v. Hudson*, 73 Cal. 285 (14 Pac. 791, 2 Am. St. Rep. 791).

2. Several conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain

passive; and this although the full time may not have elapsed which would be required to bar a remedy at law. If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances. Says Mr. Justice LORD in *Neppach v. Jones*, 20 Or. 491 (26 Pac. 569, 23 Am. St. Rep. 145), quoting from an English case: "Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the intervals, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." See, also, *Weiss v. Bethel*, 8 Or. 522; *Sedlak v. Sedlak*, 14 Or. 540 (13 Pac. 452); *Lawrence v. Rokes*, 61 Me. 38.

By the complaint it appears that the alleged copartnership theretofore existing between W. C. Wilson and Daniel Wilson was dissolved by the latter's death November 14, 1890, more than ten years prior to the commencement of this suit, and that the remaining property belonging to such copartnership was, by the strongest inference, then in the hands of W. C. and so remains. No part of this property is shown to have gone into the hands of either George W. Wilson or George M. Brown, in either their personal or representative capacity. In December, 1892, George W., as the Washington administrator, instituted actions in this state in his representative capacity upon the promissory notes, thus affording the plaintiffs ample opportunity to set up their equitable defense by way of a cross bill, as they now concede, which would have operated to give them essentially the same relief sought in this proceeding; but they did not avail themselves thereof. They have delayed action upon their demand in any capacity until George W., as such administrator, enforced his judgments by

the sale of their lands, which he was compelled to purchase for the benefit of the estate, and until the appointment of George M. Brown as administrator in this state, and a sale of such lands in his representative capacity, at which sale W. C. became the purchaser, and until all the money obtained upon this sale, and paid by W. C. into the hands of the administrator, had been remitted to George W. as administrator in the State of Washington, there to be applied upon the indebtedness of the estate of Daniel; that is to say, until the individual estate of Daniel (for neither of the administrators had anything of the alleged copartnership property to administer) has been practically administered, and almost the whole applied by his personal representatives to the discharge of his personal indebtedness. This, it appears to us, is such an unwarranted delay, under the circumstances, as to render the plaintiffs' demand stale, and one which it would be inequitable to now permit to be enforced against the representatives of Daniel's estate. Certain it is that the plaintiffs, by their acts and laches, have put the defendants to such great disadvantages that they cannot now, by the utmost diligence, present their defense in as favorable light as they might have been able to do if the plaintiffs had seasonably pressed their claim. In the meantime, the defendants have practically administered the individual estate of Daniel, and parted with almost the entire funds, presumably in the discharge of legitimate indebtedness and demands. For these reasons, plaintiffs' claim must be treated as stale, and they cannot now be permitted to prosecute it. There are some things upon the face of the pleadings suggestive of the fact that the claim is otherwise without merit, but of this we cannot speak in a ruling upon a demurrer.

Complaint is also made that George W. Wilson became the owner of the lands purchased at the execution sale in his individual capacity, and that Brown, as administrator, could not, therefore, convey any title to W. C. under his purchase. It matters not what the condition of the title was, or who was

the owner in fee at the time, because W. C. purchased at a judicial sale, and to him the doctrine of *caveat emptor* applies in its fullest sense, and he cannot complain that he did not obtain a good title, and cannot, therefore charge George W. Wilson as a trustee of such title for his benefit.

AFFIRMED.

Decided 30 June, 1902.

NEW ZEALAND INS. CO. v. SMITH.

[69 Pac. 268.]

INTERPLEADER—APPEAL—SEVERABLE DECREE.

A decree of interpleader is not severable, so as to permit a defendant to appeal from the part discharging plaintiff from liability, leaving its other provisions undisturbed as to the fund paid into court.

From Lane: JAMES W. HAMILTON, Judge.

Suit of interpleader by the New Zealand Insurance Co., a corporation, against E. C. Smith and others. From the decree in so far as it granted relief to plaintiff, defendant Smith appeals. The insurance company now moves to dismiss the appeal.

DISMISSED.

Mr. J. Clarence Veazie, for the motion.

Mr. Helmus W. Thompson, contra.

PER CURIAM. This is a motion to dismiss an appeal. On December 22, 1897, the plaintiff issued its insurance policy to one E. J. Frasier, covering \$2,190, on certain personal property belonging to him. A portion of the property was afterward consumed by fire, and, the company denying liability, Frasier brought an action against it, in which he recovered a judgment for \$1,700 on November 1, 1898. On appeal to this court the judgment was affirmed April 29, 1901: *Frasier v. New Zealand Ins. Co.*, 39 Or. 342 (64 Pac. 814). After the commencement of the action, but prior to the rendition of the judgment therein,

the insurance company was served with three writs of execution and notices of garnishment, based on judgments against Frasier, in favor of three certain parties. About the same time it was also served with notice of an attorney's lien by Frasier's attorneys. Soon after the rendition of the judgment, it was assigned by Frasier to one E. C. Smith, the respondent in this appeal. After the affirmance of the judgment, the company was advised by Smith and the attorneys of Frasier that they intended to disregard the levies or garnishments, and enforce payment of the judgment to them in full. The garnishors were preparing and threatening to prosecute their respective garnishments to judgment against the company, and as it was not in a position to determine with safety to itself the validity of these garnishments, or their priority with reference to one another, or to the claims of the attorneys of Smith and Frasier, it brought a suit, making all persons concerned parties, deposited the full amount of the fund in court, and prayed that the several claimants be required to interplead as to the ownership of the fund, and that it be distributed among them according to their respective priorities. After overruling all demurrers to the complaint, the court ordered that the defendants interplead by appropriate pleadings, which was accordingly done. Findings of fact and conclusions of law were thereafter made and filed, to the effect that the allegations of the complaint were true, that the case was a proper one for interpleader, that the plaintiff was entitled to be relieved from further liability to the defendants, and determining the rights of the respective parties to the fund in court, and directing a distribution thereof. Upon motion of Smith and other parties, a decree was entered in accordance with such findings and conclusions, the clerk was directed to distribute the fund as provided therein, the company was discharged from all further liability under or on account of the judgment recovered against it by Frasier, and the defendants were enjoined from maintaining or prosecuting any further proceedings against it on account of such judgment. Distribution of the fund was made by the clerk to the respective parties, in accordance with their rights as determined by the decree; Smith receiving and accepting the

amount directed to be paid to him. He thereafter attempted to appeal from so much of the decree as held and adjudged "that the plaintiff have the relief prayed for in the complaint herein, and be discharged from all further liability under or on account of the judgment recited in the complaint rendered in this court in the said case of E. J. Frasier, plaintiff, v. The New Zealand Insurance Co., defendant, and that the defendants, and each of them, be forever enjoined from further setting up, maintaining, or prosecuting their, or any of their, said claims or demands against plaintiff."

Plaintiff now moves to dismiss the appeal, and, in our opinion, the motion should be sustained, because the decree is not severable, in the sense that Smith can appeal alone from that part discharging the plaintiff from liability, leaving its other provisions undisturbed. In a suit of this kind, the decree, as to the plaintiff, must either be that the defendants interplead and the plaintiff be discharged from further liability, or that the bill of interpleader be dismissed: *Pope v. Ames*, 20 Or. 199 (25 Pac. 393); *North Pac. Lum. Co. v. Lang*, 28 Or. 246 (42 Pac. 799, 52 Am. St. Rep. 780). The fund cannot be distributed, and the plaintiff remain liable on the claims interpleaded. If the suit is dismissed, plaintiff is entitled to a return of the money paid into court, and such a decree cannot be made in this case, because no appeal has been taken from that part of the decree distributing the fund. It has been disbursed and paid out to Smith and others in accordance with the directions of the court below, and is not now in the custody of the court, or subject to its orders. If Smith desired to try the question on appeal as to whether the case was a proper one for interpleader, he should have appealed from the entire decree. He cannot appeal from a part only, and leave undisturbed and in force that portion favorable to himself and the other defendants. Where a decree is of such a character that a part may stand, although another portion is reversed, it is allowable in some instances for an appeal to be taken from a part only; but when it is not severable the appeal must be taken from the whole decree: *Portland Const. Co. v.*

June, 1902.] **ADVANCE THRESHER CO. v. ESTEB.** 469

O'Neil, 24 Or. 54 (32 Pac. 764); *Bush v. Mitchell*, 28 Or. 92 (41 Pac. 155). The motion to dismiss is therefore allowed.

APPEAL DISMISSED.

Decided 30 June, 1902.

ADVANCE THRESHER CO. v. ESTEB.

[69 Pac. 447.]

CONSTRUCTIVE NOTICE OF UNRECORDED DEED.

1. A mortgage from a stranger to the record title is not constructive notice to an intending purchaser of a prior unrecorded deed; nor is the fact that the property is assessed to another than the record owner such notice.

AMENDMENT BY IMPLICATION—ATTACHMENT AND EXECUTION.

2. The 1899 amendment of Section 149 of Hill's Ann. Laws, relating to attachments (Laws, 1899, p. 231, § 1), repealed by implication so much of section 238, subd. 4, as directed the omission to file a certificate by the sheriff—for now an execution can be levied only by filing a certificate.

CERTIFICATE OF LEVY OF EXECUTION AS NOTICE TO PURCHASER.

3. The filing and recording of a certificate of levy of execution against land as the property of one not a record owner, no record owner being a party to the action in which judgment was obtained, is not constructive notice to a purchaser from the record owner of a prior deed to the execution defendant, no one representing the grantee in the unrecorded deed being in possession.

VENDOR AND PURCHASER—EFFECT OF QUITCLAIM DEED.

4. A grantee in a bargain and sale deed may be a *bona fide* purchaser, as the form of the conveyance is immaterial.

BURDEN OF PROOF TO SHOW NOTICE OF EQUITABLE TITLE.

5. A plaintiff in an action of ejectment, claiming under a deed unrecorded when defendants obtained the legal title, has the burden of showing that they had notice of his title.

PRESUMPTION WHEN PART OF EVIDENCE IS BROUGHT UP.

6. Where the bill of exceptions does not purport to contain all the evidence, the appellate court will presume that the trial court acted correctly.

From Union: ROBERT EAKIN, Judge.

This is an action by the Advance Thresher Company against Addie C. Esteb and husband to recover the possession of real property. It is alleged in the complaint that plaintiff is a private corporation, and the owner in fee and entitled to the imme-

diate possession of lot 4 in block 16 of Coggan's Addition to La Grande, Oregon, and that the defendants are wrongfully in possession thereof, to its damage in the sum of \$50. The answer denies the allegations of the complaint, and avers that on August 14, 1900, Anna H. Davis and J. M. McShain, for a valuable consideration, conveyed the premises to the defendant Addie C. Esteb, who ever since has been, and now is, the owner in fee and entitled to the exclusive possession thereof. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a judgment for defendants, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *C. H. Finn* and *F. S. Ivanhoe*, with an oral argument by *Mr. Finn*.

For respondent there was a brief over the names of *Eugene Ashwill*, *Jas. A. Fee* and *L. A. Esteb*, with an oral argument by *Mr. Ashwill* and *Mr. Fee*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

To render the exceptions hereinafter adverted to intelligible, it is deemed essential to state the uncontroverted facts as disclosed by the bill thereof. It appears therefrom that prior to June 1, 1897, Rose B. Huelat was the owner in fee of said lot, at which time, in consideration of \$400, of which \$352 was paid down, she and her husband executed and delivered a warranty deed of the premises to John McDowell, who thereupon took, and, with his son, George W. McDowell, held, possession thereof until the summer of 1899, when he died, without having recorded said deed, which could not thereafter be found. The plaintiff herein having commenced an action in the circuit court for Union County, Oregon, against John McDowell, secured a judgment therein June 16, 1897, which two days thereafter was entered in the judgment docket of said county. An execution having been issued on said judgment November 16, 1897, the certificate of the levy thereof on said lot was filed and recorded

in the office of the county clerk of that county the next day, and, the premises having been sold upon said execution, the plaintiff became the purchaser thereof, and, the sale having been confirmed, a sheriff's deed therefor was executed to it, January 22, 1901, and duly recorded February 28th of that year. Rose B. Huelat, December 11, 1899, in consideration of the payment of \$48, the remainder due her on account of the original purchase, executed a bargain and sale deed of said lot to George W. McDowell, which was duly recorded two days thereafter. George W. McDowell, December 12, 1897, executed to Annie H. Davis and Gertrude R. Imus a bargain and sale deed to the premises, which was recorded February 1, 1900. Gertrude R. Imus and her husband, January 30, 1900, executed a bargain and sale deed to an undivided half of said lot to J. M. McShain, which deed was recorded February 1, 1900; and Annie H. Davis and her husband and J. M. McShain, August 14, 1900, executed to the defendant Addie C. Esteb a bargain and sale deed for said lot, in pursuance of which she took possession thereof, which deed was recorded August 17, 1900. The defendant L. A. Esteb, an attorney at law, testified that, acting as the agent of his wife, the defendant Addie C. Esteb, he examined the records of said county to ascertain the condition of the title to and the liens upon said lot at the time the deed was executed to her, and also to discover whether the title had ever been in George W. McDowell. The defendant Addie C. Esteb testified that she had no notice or knowledge of any unrecorded deed to John McDowell, or that he claimed the property, and that she paid therefor the sum of \$1,000, partly by the legal fees of her husband, in part by a mortgage, and the remainder in money. The court having refused to permit plaintiff to prove that while John McDowell was in possession of the premises he executed a mortgage thereon, June 4, 1897, that he made out a statement for the assessor swearing that he was the owner of said lot, and that, having been assessed accordingly, he paid taxes thereon, exceptions were allowed.

The plaintiff requested the court to give the following instructions: "I instruct you that any one taking title to the property

in question subsequent to November 17, 1899, took such title with notice of plaintiff's lien and levy, and is bound by plaintiff's rights as creditor levying execution, and that from the date of levy the plaintiff was a purchaser of the property in question as to all third parties, or persons obtaining title from any source subsequent in time to said levy. *Second*, I instruct you that the plaintiff in this case, at the date of its levy of execution, which was on November 16, 1899, obtained by such levy, by reason of its legal proceedings, all the right, title, and interest of said John McDowell in and to said real property; and if you find that said judgment debtor, John McDowell, had a legal title to said land, or ownership of the same, you must find for the plaintiff. *Third*, I instruct you that it makes no difference whether the said John McDowell had a deed recorded or not, at date of levy; yet if you find that he did have a deed at said time to said lot, or any title to the same, then I charge you that it was subsequent to execution under plaintiff's judgment, and you must find for plaintiff. *Fourth*, I instruct you to find for the plaintiff, and assess damages as to the rental value of the premises according to the proof." And also requested the court to submit to the jury the following verdict: "We, the jury in the above entitled action and court, find for the plaintiff, and that it is the owner and entitled to the possession of the real property described in the complaint, to wit, lot 4 in block 16, Coggan's Addition to La Grande, Union County, Oregon, and assess plaintiff's damages in the sum of \$——." The court, having refused to give either of the instructions, or to submit the verdict prepared, informed the jury that there was no question of fact in the case for them to decide; that it was a matter of law entirely; and took from them the testimony in the case, instructing them to find for the defendants, whereupon exceptions were allowed.

1. It is contended by plaintiff's counsel that the court erred in not permitting it to prove by the records of Union County that said lot was assessed in the name of John McDowell; that he made out a sworn statement of his assessable property, including said premises; and that he gave a mortgage thereon, which, having been duly recorded, remained uncanceled. The

deed from Rose B. Huelat to John McDowell never having been recorded, his name does not appear as a grantee in the chain of title, to which, so far as the record is concerned, he is an absolute stranger. John McDowell may have mortgaged the premises, but, if he did, a person searching the title would confine his examination to the direct or inverted indexes, and, having traced the chain from Rose B. Huelat to the defendant, he could not be charged with negligence because these exponents of the record failed to disclose such lien; and, while the indexes may be no part of the record, where they fail to note an instrument which has been properly recorded (*Board of Com'rs v. Babcock*, 5 Or. 472; *Nicklin v. Betts Spring Co.*, 11 Or. 406, 5 Pac. 51, 50 Am. Rep. 477), the rule thus announced can have no application to the case at bar, because John McDowell's deed was never recorded, and hence no necessity existed for a research beyond the chain disclosed by the indexes. Thus, in *Sternberger v. Ragland*, 57 Ohio 148 (48 N. E. 811), it is held that a purchaser of real property from one who, of record, appears to have the title, is not required to examine for mortgages made to the vendor after he became the owner, nor is the record as to such a mortgage constructive notice of a prior unrecorded deed to the mortgagor. Mr. Justice WILLIAMS, speaking for the court, in deciding the case says: "The record of the mortgage executed by Ragland for the unpaid purchase money for the lot was not constructive notice of his unregistered deed to a subsequent purchaser from his grantor. When a prospective purchaser finds a complete record title in the proposed seller, he is not bound to examine for mortgages made to the latter after he became the owner. Such a mortgage is not in the chain of his title, and is not, therefore, constructive notice to a subsequent purchaser of a prior unrecorded deed made by him to the mortgagor." To the same effect, see *Sayward v. Thompson*, 11 Wash. 706 (40 Pac. 379); *Lumpkin v. Adams*, 74 Tex. 96 (11 S. W. 1072); *Peterson v. McCauley*, (Tex. Civ. App.) 25 S. W. 826; *Williams v. Slaughter*, (Tex. Civ. App.) 42 S. W. 327. An intending purchaser of real property being under no obligation to examine the public records to ascertain the existence of mortgages given

by a stranger to the title, he, *a fortiori*, is not required to search the tax rolls of the county, to see if the property which he contemplates buying may not have been assessed to some one other than a grantee in the regular chain of title.

2. It is maintained that the court erred in refusing to give the first instruction requested, thereby holding that the sheriff's certificate of the levy of the execution upon the lot in question, filed in the office of the county clerk of Union County, November 17, 1899, did not impart notice to the defendants sufficient to cause them to make any inquiry respecting the plaintiff's claim to or prior rights in the property. It is argued that the levy of an execution upon real property is tantamount to an attachment thereof, which makes the plaintiff in the latter writ, as against third persons, a purchaser of the property in good faith and for a valuable consideration: Hill's Ann. Laws, §§ 150, 283, subd. 4. It will be remembered that Rose B. Huelat's deed to George W. McDowell was recorded December 13, 1899, or 26 days after the certificate of levy of the execution was filed in the clerk's office; and that Addie C. Esteb secured what title was thus attainable by mesne conveyances from him, and her deed was recorded August 17, 1900, while the sheriff's deed to the plaintiff of the premises was not recorded until February 28, 1901. The statute prescribing the mode of transferring the title to land is as follows: "Every conveyance of real property within this state heretofore made which shall not be recorded as provided in this title within five days thereafter shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded": Hill's Ann. Laws, § 3027. That Mrs. Esteb paid a valuable consideration does not appear to be controverted, and if she parted therewith, and secured the conveyance of the premises without notice of the prior unrecorded deed, her title must prevail: *Musgrove v. Bonser*, 5 Or. 313 (20 Am. Rep. 737). The character of the improvements upon the lot is not disclosed by the bill of exceptions, which also fails to show who, if any one, was in possession of the property from the time John McDowell died, in the summer of 1899,

until August 14, 1900, when Annie H. Davis and J. M. McShain, being in possession, surrendered the premises to Mrs. Esteb upon her purchase thereof. "Real property shall be attached as follows: The sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated. * * Upon receiving the sheriff's certificate as provided in section 149 the county clerk to whom the same is delivered shall immediately file such certificate in his office, and record it in a book kept for that purpose. When such certificate is so filed for record, the lien in favor of the plaintiff shall immediately attach to the property described in the certificate. Whenever such lien shall be discharged, it shall be the duty of the county clerk to enter upon the margin of the page on which the certificate is recorded a minute of the discharge": Hill's Ann. Laws, §§ 149, 150, as amended by an act approved February 22, 1899 (Laws, 1899, p. 231). "When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows: * * (4) Property shall be levied on in like manner and with like effect as similar property is attached, as provided in sections 149, 150 and 152, omitting the filing of the certificate provided for in section 151": Hill's Ann. Laws, § 283. It would appear that the act of February 22, 1899 (Laws, 1899, p. 231), amending section 149 of our statute, respecting the mode of attaching real property, also repealed by implication so much of subdivision 4 of section 283, Hill's Ann. Laws, as relates to "omitting the filing of the certificate provided for in section 151." Prior to such amendment, real property was attached by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ, certified by the sheriff, followed by filing a certificate thereof with the clerk within ten days: Hill's Ann. Laws, § 149, subd. 1, and section 151.

3. At the time Mrs. Esteb purchased the property neither the sheriff nor any person claiming the right under John

McDowell's unrecorded deed was in possession of the premises, and, Mrs. Esteb having testified that she had no knowledge of any adverse claim thereto, the certificate of the levy of the execution filed with the clerk affords the only notice chargeable to her, and the inquiry is whether this was sufficient to show that she was not a purchaser in good faith in consequence thereof. The levy of an execution on real property having the same effect as its attachment, the lien thus created is in the nature of, analogous to, and has the same effect upon the property involved as *lis pendens* in chancery: Bennett *Lis Pendens*, § 267. The property in controversy is of the character that renders it subject to the rule of *lis pendens*, and its description as given is adequate for that purpose; and the only remaining question is whether the filing and recording of the certificate of levy gave the court jurisdiction of the proper person, so as to affect a purchaser of the property from another source with the requisite notice: 13 Am. & Eng. Enc. Law (1 ed.), 877. If, at the time Mrs. Esteb purchased the property, Mrs. Huelat or the intervening grantees had been made parties, the *lis pendens* might have affected her; but their subsequent appearance, either voluntarily or otherwise, would be ineffectual, for those purchasers only are affected with notice who secure a title to property from parties to the suit: Wade, Notice, § 268; 13 Am. & Eng. Enc. Law (1 ed.), 882; Bennett, *Lis Pendens*, § 97; Devlin, Deeds, § 792; *Parks v. Jackson* (25 Am. Dec. 656); *Buxton v. Sargent*, 7 N. D. 503 (75 N. W. 811). In searching the title to real property of which, as in the present instance, the grantors were in possession, it is necessary to examine the chain, as disclosed by the recorded conveyances, from the original source to the party in possession, including liens thereon created or suffered by each grantee in the chain while he held the title. Neither Mrs. Huelat nor any of her subsequent grantees by recorded title having been made parties to the action wherein this plaintiff secured judgment against John McDowell, the filing and recording of the certificate of levy did not secure jurisdiction of the proper person, so as to charge Mrs. Esteb with constructive notice of the levy upon the lot of which she

became the purchaser, and no error was committed in refusing to give the instruction so requested.

The second and third requests for instructions, having each a clause requiring the jury to find for the plaintiff, rendered them obnoxious, and no error was committed in refusing to give them, or to give the fourth request, or to submit the verdict so prepared.

4. It is contended that because the several deeds from Mrs. Huelat to Mrs. Esteb contained no covenants of warranty the latter had such knowledge of the condition of the title to the premises as to cause her to make inquiry concerning it, which, if prosecuted with reasonable diligence, would have disclosed the execution of the deed from Mrs. Huelat to John McDowell, of the judgment rendered against him, and of the levy of the execution on the real property; but that, not having availed herself of this information, she is chargeable with such notice as the search, if prosecuted, would have revealed. Whatever the rule may be in respect to notice of an outstanding equity, to be implied from a quitclaim deed taken by a grantee who is to be charged therewith, it is not pertinent to the inquiry, nor necessary to a decision herein, for, the conveyance under which Mrs. Esteb secured possession of the lot being a bargain and sale deed, this of itself does not prevent her from becoming a *bona fide* holder of the legal title: *Raymond v. Flavel*, 27 Or. 219 (40 Pac. 158).

5. It is maintained that the burden of proving that Mrs. Esteb was an innocent purchaser for a valuable consideration, and without notice, was imposed upon her, but, as she failed to comply with such rule, the court erred in rendering the judgment complained of. This is not a suit in equity to set aside an alleged fraudulent conveyance, in which there is imposed upon the grantee the duty of alleging, and in some instances the burden of showing, that he is an innocent purchaser for a valuable consideration, and without notice: *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650, 3 Am. St. Rep. 162); *Wood v. Rayburn*, 18 Or. 3 (22 Pac. 521); *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Simpkins v. Windsor*, 21 Or. 382 (28 Pac. 72); *Jolly v.*

Kyle, 27 Or. 95 (39 Pac. 999); *Flynn v. Baisley*, 35 Or. 268 (57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495); *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22, 59 Pac. 805); *Wright v. Craig*, 40 Or. 191 (66 Pac. 807). This being an action at law to recover possession of real property, the defendants, observing the rule prescribed by statute (Hill's Ann. Laws, § 319), averred in their answer the nature and duration of their alleged estate in the premises, and offered proof thereof, which was all that was required of them. Thus, in *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. 826, Mr. Chief Justice LIGHTFOOT, answering a similar contention, says: "When the subsequent purchaser gets the legal title, and another party, holding an equitable title, seeks to oust him, the burden of proof rests on the holder of such equity to show that the subsequent purchaser had notice, actual or constructive, of his equitable title, or such facts as would put a prudent man on inquiry," See, also, to the same effect, *Hill v. Moore*, 62 Tex. 610; *Patty v. Middleton*, 82 Tex. 586 (17 S. W. 909).

6. It is maintained that the court erred in informing the jury that there was no fact in the case for them to decide; that it was a matter of law entirely; and also erred in taking from them the testimony, and in instructing them to find for the defendants. The bill of exceptions does not purport to contain all the testimony, in the absence of which the court may have correctly informed the jury that there was no issue of fact to decide, and, this being so, we cannot say that error was committed as alleged. It follows from these views that the judgment is affirmed.

AFFIRMED.

Decided 7 July, 1902.

TAYLOR v. LAPHAM.

[69 Pac. 439.]

41 479
45 91**APPEAL—NECESSITY OF FILING THE NOTICE IN TIME.**

1. Under Laws, 1901, p. 78, § 5, providing that an appeal, if not taken at the time of the rendition of the judgment or decree appealed from, shall be taken by serving and filing the notice of appeal within six months from the entry of judgment, failure to file the notice within that time is fatal to the appeal, though the notice has been served on the opposite party.

POWER TO EXTEND TIME FOR FILING NOTICE OF APPEAL.

2. Under a statute such as Laws, 1901, p. 78, § 4, providing that where a party gives due notice of an appeal, and thereafter omits, through mistake, to do any other act necessary to perfect the appeal, the judge may permit the performance of such act, does not authorize the judge to permit the filing of the notice of appeal, when such notice has not been filed within the time limited by the statute, for the filing is absolutely indispensable to the conferring of jurisdiction. Until the notice is filed there is no appeal to be perfected, and hence nothing that an order can operate on.

From Klamath: HENRY L. BENSON, Judge.

Action by James Taylor and others against Gilbert C. Lapham.
From a judgment for plaintiffs, defendant attempted to appeal.
Plaintiffs moved to dismiss.

DISMISSED.

Mr. Chas. A. Cogswell, for the motion.

Mr. Austin S. Hammond, contra.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a motion to dismiss an appeal because the notice thereof, although served, was not filed within six months from the rendition of the decree. After the six months had expired, the appellant obtained an order from the judge of the court below permitting him to file the notice, which was done accordingly, and the only question is whether the court acquired jurisdiction by such filing. The statute provides that an appeal, if not taken at the time of the rendition of the judgment or decree appealed from, shall be taken by serving and filing the notice of appeal within six months from the entry of the judgment:

Laws, 1901, pp. 77, 78, § 5. This statute, standing alone, plainly makes the filing of a notice of appeal as essential as its service. A similar statute, regulating appeals from justices' courts, has been so construed, in *State v. Zingsem*, 7 Or. 137; *Odell v. Gotfrey*, 13 Or. 466 (11 Pac. 190); *Hennes v. Wells*, 16 Or. 266 (19 Pac. 121).

2. But it is argued that the statute referred to authorizes the trial court or judge thereof, or the appellate court, to extend the time in which the notice may be filed. The section relied on provides that "when a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just": Laws, 1901, pp. 77, 78, § 4. This language, by its terms, is confined to such act as may be necessary to perfect the appeal or stay the proceedings, and does not authorize either the court or the parties to dispense with any of the steps necessary to take the appeal. The statute limiting the time in which an appeal may be taken is mandatory and jurisdictional, and cannot be waived by the court, nor can the court entertain any excuse for not complying with its requirements: 2 Ency. Pl. & Pr. 239. The statute makes the service and filing of the notice of appeal indispensable to give this court jurisdiction (*Oliver v. Harvey*, 5 Or. 360), and an appeal is not taken unless the notice is both served and filed. The filing, therefore, is as important as the service, and both are required to be done within six months. If the court can extend the time in which to file the notice, it can thus, in effect, extend the time in which an appeal may be taken, and, under all the decisions, it has no power to make such an order.

The motion to dismiss is therefore allowed. DISMISSED.

Decided 30 June, 1902.

UNITED STATES MORTGAGE CO. v. WILLIS.

[69 Pac. 266.]

41	481
42	594

RIGHT OF PURCHASER OF LEASED PREMISES TO THE RENT.

1. Under Section 307 of Hill's Ann. Laws, providing that a purchaser of land at a judicial or execution sale, from the day of sale until a resale or redemption shall be entitled to the possession, unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be "entitled to receive from the tenants the rents, or the value of the use and occupation thereof, during the same period," a tenant of land sold on foreclosure who is holding under an unexpired lease made by the owner of the property subsequent to the mortgage, must pay to the purchaser thereof, whether the mortgagee or not, the rent, or the value of the use and occupation of the premises, from the day of sale, notwithstanding, in accordance with his lease, he has paid the rent in advance to his lessor.

ALLOWANCE OF COSTS.

2. Under Hill's Ann. Laws, § 549, subd. 5, allowing plaintiff costs in actions not elsewhere classified when he shall recover fifty dollars or more, and section 551, allowing costs to defendant unless plaintiff be entitled to them, a recovery of less than fifty dollars in an action included in subdivision 5 of section 549 does not carry costs, but defendant is entitled to costs against plaintiff.

From Multnomah: ARTHUR L. FRAZER, Judge.

This is an action by the United States Mortgage & Trust Company, the purchaser of real estate at a judicial sale, against P. L. Willis, a tenant in possession under an unexpired lease, to recover rent, or the value of the use and occupation of the premises, from the day of sale. The facts are that in October, 1894, the Portland Savings Bank mortgaged the premises upon which the building, a part of which is occupied by the defendant, is situated, to the plaintiff, to secure the payment of \$150,000, and the mortgage was duly recorded on the following day. On October 12, 1901, a suit was commenced to foreclose the mortgage, and Henry F. McClure, the successor in interest of the savings bank, was made a party defendant. Thereafter, and on October 31, 1901, McClure leased three rooms in the building to the defendant for a rental of \$35 a month, payable in advance on the first day of each calendar month. A decree of foreclosure was subsequently rendered, and on January 13, 1902, the prop-

erty was sold under the decree to the plaintiff. A few days later, it notified defendant that it had purchased the property, and demanded the rent for the rooms occupied by him from the date of the purchase until the first of the following month, but he refused to make such payment on the ground that under the terms of his lease he had paid the rent for the entire month of January to McClure on the first of the month, and prior to the sale. This action was thereupon begun in the circuit court to recover \$20.32 as rent from January 14th to February 1st, and, a judgment having been rendered in favor of the plaintiff for the amount demanded, and for costs and disbursements, the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Parrish L. Willis, in pro. per.*

For respondent there was a brief and an oral argument by *Mr. J. Thorburn Ross, Mr. E. B. Seabrook, and Mr. Wm. A. Munly.*

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The principal question for determination is whether, in case land sold under a decree of foreclosure is in possession of a tenant holding under an unexpired lease made by the owner of the property subsequent to the execution of the mortgage, the purchaser thereof is entitled to the rent, or the value of the use and occupation of the premises, from the day of sale, notwithstanding the tenant, in accordance with the terms of his lease, has paid the rent in advance to his lessor. The defendant's brief contains a discussion of the rights at common law of a mortgagor, mortgagee, and a tenant of the mortgaged premises; and it is insisted that under our statute a tenant in possession of property at the time of a judicial sale, holding under an unexpired lease, stands in the same position, and is entitled to the same rights, as the lessee of mortgaged property at common law holding under a lease executed prior to the mortgage. But

we are not dealing with the rights of a mortgagee and a tenant of the mortgaged property, but with those of a purchaser at a judicial sale and one in possession, holding under an unexpired lease. The fact that in this particular case the purchaser happens to be the mortgagee is a mere incident, and has no effect on the question involved. In our opinion, the question for decision is plainly settled by the statute. Section 307, Hill's Ann. Laws, provides that a purchaser of land at a judicial or execution sale, from the day of sale until a resale or redemption shall be entitled to the possession, unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be "entitled to receive from the tenants the rents or the value of the use and occupation thereof during the same period."

Under this statute the purchaser is entitled either to the possession of the property, or to the value of the use and occupation thereof, from the day of sale until a resale or redemption. If at the time of the sale the property is not in possession of a tenant holding under an unexpired lease, he is entitled to the immediate possession; but, if it is in possession of such a tenant, he is then entitled to the rents, or the value of the use and occupation thereof, for the same time. No contract of a mortgagor made subsequent to the mortgage can deprive the purchaser of the rights given him by statute. This necessarily results from the principle that a subsequent lease or grant of mortgaged premises is subject to the prior mortgage, and the interest acquired by the grantee or lessee therein is subject to be defeated by a subsequent foreclosure and sale. In this case the plaintiff's mortgage was on record at the time the lease was made to the defendant, and he had at least constructive notice of the rights of the plaintiff thereunder, and must be held to have accepted his lease and paid the rent in advance with knowledge of the fact that in case of a foreclosure and sale the purchaser would be entitled to the rents from the day of sale. The defendant's lessor was not entitled to the rent of the premises after the day of sale, and it therefore can be no defense to the defendant that he paid it to him, whether before or after that time. "If," as said by the Supreme Court of California, "the

law were otherwise, it would be in the power of the mortgagor to materially diminish the value of the mortgaged property as security for the debt for which mortgage was given by simply leasing it for a long period, and collecting the rent in advance, or by leasing it for such period for a nominal rent": *Harris v. Foster*, 97 Cal. 292 (32 Pac. 246, 33 Am. St. Rep. 187). If the mortgagor or his successor in interest could, by leasing mortgaged premises and collecting the rent in advance, deprive the purchaser at the foreclosure sale of the value of the use and occupation during that time, there would be no limit to his right in the premises, and he could make such a lease for any length of time he might think proper. To permit him to do so would practically be annulling the statute, and would be contrary to the interpretation of similar statutes by other courts: *McDevitt v. Sullivan*, 8 Cal. 592; *Walker v. McCusker*, 71 Cal. 594 (12 Pac. 723); *Harris v. Foster*, 97 Cal. 292 (33 Am. St. Rep. 187, 32 Pac. 246); *Byers v. Rothschild*, 11 Wash. 296 (39 Pac. 688). We are of the opinion, therefore, that plaintiff is entitled to judgment against the defendant for the rent of the rooms occupied by him from the day of sale.

2. As the amount sued for is less than \$50, the judgment in favor of plaintiff, however, for costs and disbursements is erroneous. In an action of this kind the plaintiff is not entitled to costs unless he shall recover \$50 or more (Hill's Ann. Laws, § 549), and, unless he does recover judgment for that amount, the defendant is entitled to costs as a matter of course: Hill's Ann. Laws, § 551.

The judgment appealed from will therefore be reversed as to the matter of costs, and the cause remanded to the court below, with directions to enter judgment in favor of the plaintiff for \$20.32, as rent for the premises sued for, and in favor of the defendant for his costs and disbursements in the lower court.

REVERSED AS TO COSTS.

Argued 26 June; decided 7 July, 1902.

SCHOOL DISTRICT v. PALMER.

[69 Pac. 453.]

SCHOOL DISTRICT—CHANGING BOUNDARIES—STATUTES.

Laws, 1899, pp. 209, 216, § 19, subd. 1, creates a District Boundary Board, which is given power to make alterations and changes in the boundaries of school districts when petitioned to do so "in the manner hereinafter specified." No manner of petitioning the board is prescribed by statute. *Held*, that, construed in the light of the former statute (Hill's Ann. Laws, § 2590, subd. 3), the phrase, "in the manner hereinafter specified," should be regarded, not as surplusage, but as modifying "petitioned," and, as no manner of petitioning is specified, the board is without authority to make changes in boundaries. The mode of exercising the power conferred was intended to be its measure, and, there being no mode, there is practically no power.

From Linn: REUBEN P. BOISE, Judge.

Proceeding by School District No. 110 against D. M. Palmer and others, constituting the District Boundary Board of Linn County, to review the action of that board in changing the boundaries of district No. 110. From a judgment dismissing the petition, plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief over the names of *H. C. Watson* and *L. L. Swan*, with an oral argument by *Mr. Watson*.

MR. JUSTICE WOLVERTON delivered the opinion.

This case comes here on plaintiff's appeal from a judgment of the circuit court dismissing a proceeding instituted by it to review the action of the District Boundary Board of Linn County, Oregon, changing or re-establishing the boundaries of School District No. 110. The board acted upon a petition of 16 persons, residents of said district and certain unorganized school territory, praying that such unorganized territory be added to the district, and another of 20 residents of district No. 4, praying that its north boundary be re-established as it was originally when district No. 109 was severed from it. Other

patrons of district No. 110 protested, assigning two grounds therefor: (1) That the school house was too small; and (2) that such action as prayed for would make district No. 110 liable for the debts of the old district No. 109.

The plaintiff insists that the board was without adequate authority in the premises, and, therefore, that its acts in changing or re-establishing said boundaries were inoperative and void. The board derived whatever authority it had from section 19, subdivision 1, of the act of the legislative assembly of 1899 creating it (Laws, 1899, pp. 209, 216), which reads as follows: "The superintendent and the county court, or the board of commissioners in counties where this board is a separate body, shall constitute a board for laying off his county in convenient school districts, such board to be styled the District Boundary Board. Said board shall make alterations and changes in the same when petitioned so to do, in the manner hereinafter specified; and the superintendent shall make a record showing the boundaries and numbers of all the districts in his county so established and organized." The construction put upon this section is that the board can only make the alterations and changes when petitioned in the manner specified, and the contention is that as the manner is not specified, and no method of procedure has been prescribed, the statute is a nullity, and the board, although legally constituted, is left without power in that particular. The respondents contend for a different construction, which is that the board shall make the alterations and changes in the manner specified when petitioned so to do; that is to say, that the words "in the manner hereinafter specified" do not refer to the petition at all, but to the manner of establishing and changing boundaries of districts.

The statute was intended, no doubt, as a revision of the former method of altering and changing the boundaries of school districts, devolving the authority upon the District Boundary Board instead of the superintendent, but the language conferring the power is identical in either case. We may look, therefore, to the old statute which this was intended to revise, and consider it in connection with the new in the ascertainment of a

proper interpretation. By the old it was provided that "he (the superintendent) may establish new districts, when not already laid off, on petition of three legal voters of each proposed new district, but shall not make any changes within the districts of his county unless petitioned so to do by a majority of legal voters of each district concerned in the change": Hill's Ann. Laws, Tit. III, § 2590, subd. 3. There was no special manner provided as to the method to be pursued by the superintendent in changing boundaries. When he concluded that it was proper to make an alteration or change, he entered the same of record, there being no prescribed mode; nor is there any more specifically prescribed manner or mode under the new law for making such changes or alterations. The present statute further provides that, when the board shall have established a new district, the superintendent shall notify three of the petitioners therefor, giving the number and boundaries thereof, and when alterations are made he shall notify, in manner aforesaid, the directors of all the districts concerned.

Now, there is no provision whatever for petitioning for new districts, or for having alterations or changes made in those previously established, beyond the provision last above referred to, which would indicate an intendment on the part of the legislature that new districts should be established on a petition of not less than three persons. It is very apparent, therefore, that something of the legislative purpose has been omitted in framing the act, and it is also quite apparent that the language "in the manner hereinafter specified," as used in the old act, alluded to the manner in which the superintendent should be petitioned to make the alterations and changes. If bearing that sense in the old, there is nothing in the new or present statute to indicate that it should be given a different construction; and such is the meaning derivable from its general arrangement. To give it the construction contended for by respondents, there must be a transposition of clauses, and this is not permissible unless such a meaning was clearly intended, such intention to be ascertained from other provisions of the act when construed as a whole; and there can reasonably be no such deduction in this case. Such

being the ascertained meaning of the act, it is wholly inoperative by reason of the omission of the legislature to prescribe the manner or mode for petitioning the board. The mode was intended to be the measure of the power, and, none having been adopted, the board was left without the requisite authority to make the alteration or change: *Chaffee's Appeal*, 56 Mich. 244 (22 N. W. 871); *State v. Partlow*, 91 N. C. 550 (49 Am. Rep. 652); *Ward v. Ward*, 37 Tex. 389. The board itself could not prescribe the manner, or say what would be a sufficient petition, because its authority depended upon being petitioned in the manner to be prescribed by the legislature, but which was omitted from the statute. It is further contended that the words "as hereinafter specified" should be treated as surplusage, which would leave the act otherwise complete and operative. It may happen that no sensible meaning could be given to some word or phrase in a statute, or that such a meaning, if given, would defeat the real object of enactment. In either case, the word or phrase might with propriety or should be eliminated: *Endlich*, *Interp. Stat.* § 301. But this is not the present case, as the real object of the enactment is apparent here, and the elimination would practically amount to a defeat of the object, and we find no reason for departing from the general rule that full effect must be given to every word if possible. *State ex rel. v. Simon*, 20 Or. 365 (26 Pac. 170), is instructive as to the rules of interpretation more or less applicable here. These considerations lead to a reversal of the judgment, and it is so ordered. REVERSED.

Argued 16 June; decided 7 July, 1902.

EX PARTE NORTHRUP.*

[69 Pac. 445.]

SUNDAY LAW—BARBERS—SPECIAL AND LOCAL LAW.

1. The barber law of 1901, making it a misdemeanor to carry on the business of barbering on Sunday, and providing a penalty for so doing, (Laws, 1901, p. 17) is not a special or local law for the punishment of crimes and misdemeanors, as prohibited by Const. Or. Art. IV, § 23, subd. 2, because, first, it is not a law at all for the punishment of offenses, and, second, because it applies alike to every locality in the state.

BARBERS' LAW—CLASS LEGISLATION.

2. A law prohibiting the practicing of a particular trade on Sunday, such as barbering (Laws, 1901, p. 17), is not class legislation, though there is no general Sunday law.

DEPRIVATION OF LIBERTY AND PROPERTY AND EQUAL RIGHTS.

3. A law making it a misdemeanor to do barbering on Sunday, such as Laws, 1901, p. 17, does not deprive any one of liberty or property without due process of law, as prohibited by Const. U. S. Amend. XIV, nor does it encroach on the equal rights which are declared by Const. Or. Art. I, § 1, to belong to all citizens; but it is a reasonable exercise of the police power, based on an apparent natural distinction.

From Multnomah: JOHN B. CLELAND, MELVIN C. GEORGE, and ALFRED F. SEARS, JR., Judges, in joint session.

Petition for release from custody by W. N. Northrup. From an order denying the writ, petitioner appeals.

AFFIRMED.

For appellant there was a brief over the names of *Cicero M. Idleman*, *Lionel R. Webster*, and *Robert W. Galloway*, with an oral argument by *Mr. Idleman*.

For respondent there was a brief over the names of *D. R. N. Blackburn*, Attorney General; *Geo. E. Chamberlain*, District Attorney; *John Manning* and *Arthur C. Spencer*, with an oral argument by *Mr. Blackburn* and *Mr. Chamberlain*.

* NOTE.—This case is also published in 55 Cent. Law Jour. 149, with a note, *Constitutionality of Statutes Prohibiting All or a Particular Kind of Labor on Sunday*.

MR. JUSTICE WOLVERTON delivered the opinion.

The legislature, at its last biennial session, enacted a statute making it "a misdemeanor for any person or persons to carry on the business of barbering on Sunday in Oregon": Laws, 1901, p. 17. The petitioner is charged with its violation, and, being in the custody of an officer, instituted a proceeding in the circuit court by *habeas corpus*, to secure his release, and, being unsuccessful, prosecutes an appeal to this court. The statute is challenged as in derogation to the fourteenth amendment to the federal constitution, and to Const. Or. Art. I, § 1, and Art. IV, § 23.

1. The first position taken by counsel for petitioner is that there is no Sunday law in this state, and that the act, by reason of its embracing such persons only as may fall within the designation of barbers, is necessarily special. Special legislation is inhibited by the state constitution relative to numerous subjects specifically designated, among which are those enumerated in section 23 of Article IV, and others that might be mentioned; but the subject of the legislation here inveighed against is not found among those so designated. It cannot be regarded as special legislation for the punishment of crimes and misdemeanors as inhibited by Const. Or. Art. IV, § 23, subd. 2, simply because it adds a penalty for an infraction of the law. The penalty is but an incident, and as the law does not fix a different penalty for different persons falling within its scope, and as it applies alike to every locality within the state, it is neither special nor local within the meaning of such subdivision.

2. Nor does it seem to us that the act can be characterized as special legislation because there is no general Sunday law within the state. If the classification is a proper one, and the act operates alike upon every individual of the class, its validity cannot be made to depend upon whether or not all persons are prohibited from doing any secular business or labor on Sunday. It is admitted that it is perfectly competent, under the constitution, to enact a law prohibiting any secular business or labor, other than works of necessity or mercy, upon the first day of the

week, commonly called Sunday. The later adjudications are uniform to that purpose, and it would be a work of supererogation to attempt to review them: *Hennington v. State*, 90 Ga. 396 (17 S. E. 1009); *Hennington v. State*, 163 U. S. 299 (16 Sup. Ct. 1086); *Bloom v. Richards*, 2 Ohio St. 387; *State v. Petit*, 74 Minn. 376 (77 N. W. 225); *Petit v. Minnesota*, 177 U. S. 164 (20 Sup. Ct. 666); *Ex parte Andrews*, 18 Cal. 678. So that the real and vital question herein is whether, in a broad sense, the act under consideration is obnoxious as class legislation.

A brief reference to the prior legislation of the state upon the subject will serve to give a clear understanding of the situation, and aid us materially in arriving at a correct and final solution of the controversy. In 1854, it was enacted by the territorial assembly "that no person shall keep open his or her store, shop, grocery, ball alley, billiard saloon, tippling house, or any place of gaming or amusement, or do any secular business, other than works of necessity and mercy, on the first day of the week, commonly called the Lord's Day or Sunday" (Laws, 1854-55, p. 283, § 1), prescribing a penalty. In 1864, the state legislature adopted an act of identical import, except the words "or labor" were inserted after the phrase "or do any secular business"; and works of necessity were defined to be: (1) The buying and selling of meats, fish, or milk at retail, before 9 o'clock in the morning; (2) the buying and selling of drugs and medicines at retail or upon prescription; (3) the selling of food to be eaten on the premises where sold; and (4) the keeping open of barber shops and laboring at such trade until 10 o'clock in the morning: Deady's Laws, c. 49, § 653, subds. 1, 2, 3, 4. In 1865, this act was amended so as to read: "If any person shall keep open any store, shop," etc., "for the purpose of labor or traffic, or any place of amusement, on the first day of the week," etc., "provided that the above provision shall not apply to the keepers of drug stores, doctor shops, undertakers, livery stable keepers, barbers, butchers and bakers; and all circumstances of necessity and mercy may be pleaded in defense, which shall be treated as questions of fact for the jury to determine when the offense is

tried by jury" (Laws, 1865, p. 34); and such was the condition of the law at the time of the enactment of the statute under consideration. It may be noted that the law of 1865 does not inhibit labor on Sunday, except it be in connection with a store, shop, grocery store, etc., kept open for that purpose, or for traffic, and it excepted barber shops with other business vocations from its operation; and thus, and by the former legislation of 1864, indicating a legislative policy of classifying different business occupations, including barbers, and of dealing with them with reference to such classifications. The effect of the act in controversy is to take the business of barbering out of the category of the exceptions and classifications contained in the law of 1865, and to absolutely inhibit the prosecuting of such business on Sunday. Under the act of 1864, it was inhibited partially; that is, after 10 o'clock in the morning, and, unless it was a business of necessity, it was also inhibited by the territorial act of 1854.

3. Is the act in contravention of the fourteenth amendment of the federal constitution, in that it deprives the petitioner of liberty or property without due process of law, or of Const. Or. Art. I, § 1, in that it encroaches upon his guaranty of equal rights? Every individual, under the constitution, is entitled as of right to the greatest degree of freedom in action compatible with a just preservation of equal rights and privileges to every other citizen and the promotion of the public welfare. This is civil liberty. The fundamental principle upon which it is based is equality under the law, and it signifies not only freedom of the citizen from servitude and restraint, but accords to every one the right to be left free in the use of his powers and faculties, and to adopt and pursue such vocations and employment as his untrammelled will may suggest, subject only to such restraint as is necessary to secure the general welfare. The right of property, in its broad sense, is not only the right of possession and enjoyment, but also the right to secure it through any lawful industry, pursuit, or calling adopted in the exercise of one's liberty, which, it is said, "is the foundation of all wealth": *Braceville Coal Co. v. People*, 147 Ill. 66 (35 N. E. 62, 22 L. R. A. 340, 37 Am. St.

Rep. 206). So that any encroachments upon the rights of a citizen, or class of citizens, guaranteed to all under similar conditions and circumstances, may be said to deprive him or them of both liberty and property, and to be an invasion of the guaranteed equality in rights.

With these preliminary observations, let us proceed to the examination of the classification complained of. Mr. Cooley says: "Doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of the property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict": Cooley, Const. Lim. 484. The principle that there must be some natural and rational ground upon which to base the distinction for classification has been recognized and adopted by this court. "It may not be arbitrary, and requires something more than a mere designation by such characteristics as will serve to classify. The mark of distinction must be something of substance, some attendant or inherent peculiarity, calling for legislation, suggested by natural reason, of different character to subserve the rightful demands of governmental needs": *Ladd v. Holmes*, 40 Or. 167 (66 Pac. 714, 716); *State ex rel. v. Frazier*, 36 Or. 178 (59 Pac. 5). All admit the statute in question can only be sustained as a police regulation. In *State v. Petit*, 74 Minn. 376 (77 N. W. 225), where the act prohibited all labor on Sunday except works of necessity and charity, and provided that keeping open a barber shop on Sunday

should not be deemed a work of necessity or charity, it was held that the classification was not purely arbitrary, but that the apparent natural reasons suggesting the distinction were ample upon which to support legislative discretion in adopting it. The court, speaking through Mr. Justice MITCHELL, says: "The object of the law was not to interfere with those who wish to be shaved on Sunday, or primarily to protect the proprietors of barber shops, but mainly to protect the employes in them, by insuring them a day of rest." This case was appealed to the Supreme Court of the United States, where the court, speaking through Mr. Chief Justice FULLER, says: "We recognize the force of the distinction suggested, and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the states in these matters, by holding that the classification was so palpably arbitrary as to bring the law into conflict with the federal constitution." If not in conflict with the federal constitution, it is necessarily not in conflict with our own.

In *People v. Havnor*, 149 N. Y. 195 (43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707), the court, in passing upon the constitutionality of a similar statute and assigning reasons for upholding the classification, says: "It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the constitution, which 'presupposes its existence, and is to be construed with reference to that effect'." A like act was upheld in *People v. Bellet*, 99 Mich. 151 (41 Am. St. Rep. 589, 57 N. W. 1094), upon the same principle. We are not unmindful of the fact, however, that there are other cases

in irreconcilable conflict with these: *Ex parte Jentsch*, 112 Cal. 468 (44 Pac. 803, 32 L. R. A. 664); *Eden v. People*, 161 Ill. 296 (43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365); *State v. Granneman*, 132 Mo. 326 (33 S. W. 784); *City of Tacoma v. Krech*, 15 Wash. 296 (46 Pac. 255, 34 L. R. A. 68). But we are impelled to the conclusion that the former are grounded upon the better reasoning; and, being in harmony with the legislative policy, as indicated by the acts referred to, relative to the subject-matter, from an early date, and having the sanction of the federal supreme court, we are constrained to hold that the law is valid under both the federal and state constitutions. The judgment of the trial court will, therefore, be affirmed.

AFFIRMED.

Argued 24 June; decided 14 July, 1902.

STATE v. O'DAY.

STATE v. TARPLEY.

[69 Pac. 542.]

41	495
46	160
47	65

EXAMPLE OF AN APPEALABLE ORDER.

1. An order in an escheat proceeding directing specified persons who are not parties thereto to turn over to a receiver certain property which has been received by them is an appealable order, under Section 535 of Hill's Ann. Laws.

CONTROL OF PERSONAL PROPERTY DURING ADMINISTRATION.

2. The personal property of a decedent goes to the administrator, and all title thereto must be derived through him; but the title to real property descends at once and directly to the heirs under Section 1120 of Hill's Ann. Laws.

ESCHEAT—RIGHT OF STATE TO APPEAR IN COUNTY COURT.

3. The state, when in pursuit of escheated property, has the same right to appear in a county court and determine questions of heirship that a natural person has, and it is bound by the proceedings in that court, until reversed or set aside, as a natural person would be; in other words, having possession of the personal property of an estate, and having given the notice of distribution designated by statute, and in the manner required, the orders of the county court based thereon cannot be collaterally attacked.

RELATIVE POSITION OF PROBATE AND ESCHAT PROCEEDINGS.

4. Construing together, Section 895 of Hill's Ann. Laws, conferring on county courts exclusive probate jurisdiction; sections 1183 and 1191, directing the payment of claims, charges and legacies, and the distribu-

tion of the remaining proceeds of personal property; section 3099, providing that the residue of personal property shall escheat; and sections 3135, *et seq.*, prescribing the method of procedure; it is reasonably apparent that the beginning of an escheat proceeding in a circuit court, as provided by section 3136, was not intended to interfere with or to interrupt the usual proceedings in the county court in a given estate, or to affect the jurisdiction of that court in any way.

From Multnomah: JOHN B. CLELAND, Judge.

From Multnomah: ARTHUR L. FRAZER, Judge.

In September, 1895, one P. C. McCann died intestate in Multnomah County, leaving personal property to the value of about \$8,000, and J. S. Cooper was regularly appointed administrator of his estate by the county court of that county. After the estate had been fully administered, Cooper filed his final account, showing a balance on hand for distribution of \$6,268.47 in cash, 10 shares of the capital stock of the First National Bank of Independence, and a few other articles of personal property. The court thereupon set a day for hearing objections to such final account and for the settlement thereof, and directed that notice be given as provided by law, which was done accordingly. But before the account had been settled and the property distributed, and on September 7, 1899, Cooper was removed as administrator, and John F. Logan appointed as his successor. A few days thereafter an information was filed, under Section 3137, Hill's Ann. Laws, in the circuit court of Multnomah County,—Judge Cleland presiding,—for a decree escheating the property to the state. The information alleges the death of McCann without heirs, the appointment of Cooper, his subsequent removal, the appointment of Logan, that certain named persons claimed to be the heirs of McCann, and that the property was then in the possession of Logan as administrator of the estate. An order was made by the circuit court directing and requiring all persons interested in the estate to appear and show cause, if any, on the 6th of November, 1899, why the title to the property should not vest in the state, and that a copy of such order be printed in the Pacific Christian Advocate, a newspaper published in the county, for six consecutive weeks. Sum-

mons was also issued in regular form, and served upon both Cooper and Logan, but upon no other person. On the 2d of November, Logan filed an answer setting up the proceedings in the county court, and alleging that he was the regularly appointed and qualified administrator of the estate; that he had in his possession as such administrator certain personal property belonging to the estate; that the estate was still in process of administration, and that certain named persons who claimed to be the heirs had applied to the county court for an order of distribution; that their rights and interests were then in process of adjudication; and that no final order had been made or entered. Thereafter, and before any further proceedings were had on the information, the county court proceeded to a final settlement of the estate, and on November 3, 1899, regularly entered an order of distribution, adjudging and decreeing that James McCann, Kate Wood, and Anna McDonough were the lawful heirs of the decedent, and entitled to the property, and directing Logan, as administrator, to deliver it to them. On the same day, in obedience to the order, Logan delivered all the property to the defendants, O'Day & Tarpley, attorneys for the persons whom the county court adjudged to be the heirs; and the county court made an order discharging him as administrator, and exonerating his bondsmen. On the following day an application was made in the escheat proceeding for the appointment of a receiver, and by order of the circuit court a notice was served upon Logan and O'Day & Tarpley, requiring them to appear on the 7th and show cause, if any they had, why the appointment should not be made. No service of this notice was made upon the persons adjudged by the county court to be the heirs of the estate, nor were they or any of them except James McCann made parties to the escheat proceeding. Logan answered, setting up his discharge by the county court, and alleging that he had delivered the property in controversy to O'Day & Tarpley. The latter appeared specially and objected to the jurisdiction of the court over them and their clients; but, such objection being overruled, they answered, setting up in detail

the proceedings in the county court. A reply was filed, denying the heirship of the clients of O'Day & Tarpley, and the jurisdiction of the county court to make an order of final distribution or to determine the question of heirship. A receiver was afterward appointed, and O'Day & Tarpley were ordered and directed to deliver and turn over to him all the personal property received by them from the administrator of the McCann estate under the orders of the county court, which they refused to do; and on January 15, 1900, an information was filed before Judge Frazer for an order requiring them to show cause why they should not be punished for contempt. As a justification for their acts, they set up in detail the proceedings in the escheat case and also in the county court. Judge Frazer, however, refused to re-examine the questions passed upon by Judge Cleland, adjudged them guilty of contempt, and directed that they be imprisoned until the order was complied with. O'Day & Tarpley appeal from this order, and also from the one directing them to deliver the property in their possession to the receiver.

REVERSED.

For appellants there was a brief over the names of *William W. Cotton* and *William D. Fenton*, with an oral argument by *Mr. Cotton*.

For the State there was a brief over the names of *Geo. E. Chamberlain*, District Attorney; *John T. Whalley*, and *Chester V. Dolph*, with an oral argument by *Mr. D. R. N. Blackburn*, Attorney General, and *Mr. Dolph*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is insisted that the order of Judge Cleland requiring the defendants O'Day & Tarpley to deliver to the receiver appointed in the escheat proceedings the property received by them from McCann's administrator in pursuance of the orders of the county court was not final, and therefore not appealable. The statute provides that an order affecting a substantial right, and

which in effect determines the action or suit, shall be deemed a judgment or decree from which an appeal may be taken (Hill's Ann. Laws, § 535); and it is believed that, so far as the rights of O'Day & Tarpley and their clients are concerned, the order requiring them to deliver possession of the property to the receiver is within the meaning of this section. They were not parties to the escheat proceeding, and as to them the order was practically final. It proposed to take from them possession of property to which they asserted title, and deliver it to another, in a proceeding in which they were not parties, and could not further appear as a matter of right. It would seem that the orderly way would have been either for the receiver to proceed against O'Day & Tarpley in the usual manner to try their rights, or the information should have been amended so as to make them parties to the suit, and thus give them a right to appear in the escheat proceeding and litigate the questions sought to be determined. The order requiring them to deliver the property to the receiver, without their being parties to the proceeding, in effect settled their rights and those of their clients in the subject-matter of the litigation. It would seem, therefore, to have been an appealable order: *Basche v. Pringle*, 21 Or. 24 (26 Pac. 863); *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710); *State v. Security Sav. Co.*, 28 Or. 410 (43 Pac. 162); *Therkelsen v. Therkelsen*, 35 Or. 75 (54 Pac. 885, 57 Pac. 373). But whether it was or not, the appeal in the contempt proceedings brings up for consideration the same questions sought to be raised on the other appeal.

Upon the merits two questions are presented: First, the effect of a decree of a county court determining who are the heirs of a deceased person, and distributing the personal property belonging to the estate among them; and, second, the effect of the filing of an information in an escheat proceeding, under section 3137, upon the previously acquired jurisdiction of a county court.

2. By Section 895, Hill's Ann. Laws, the county court is invested with exclusive jurisdiction in the first instance pertaining to a court of probate,—among other things, “to direct and control the conduct and settle the accounts of executors, administrators, and guardians,” and “to direct the payment of debts

and legacies, and the distribution of the estates of intestates"; and by section 1191 it is provided that, after the payment and satisfaction of all claims and charges against the estate, the county court, or judge thereof, shall direct the payment of legacies, and the distribution of the remaining proceeds of personal property among the heirs and other persons entitled thereto. Here is positive legislative authority for a county court, not only to settle the accounts of executors and administrators, but to direct the payment of debts, and the distribution of the estate of intestates among the heirs or other persons entitled thereto; and the statute provides that its judgments and decrees shall be final and conclusive upon all persons as to the title and status of the property: Hill's Ann. Laws, § 733. There is a marked difference, however, in its jurisdiction over real and personal property. The title to real property descends to the lawful heirs immediately upon the death of the ancestor, subject only to the right of the administrator or executor to possession for the purpose of paying debts, etc.: Hill's Ann. Laws, §§ 1120, 1192; *Clark v. Bundy*, 29 Or. 190 (44 Pac. 282); *In re Jahn's Will*, 30 Or. 494 (47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242). No order of the county court, therefore, sitting for the transaction of probate business, attempting to partition real estate of a decedent, or determining the question of heirship, can affect the title: *Hanner v. Silver*, 2 Or. 336. And such is the character of cases cited by the plaintiff: *Sands v. Lynham*, 27 Grat. 291 (21 Am. Rep. 348); *Brace v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 Wis. 238; *Cryer v. Andrews*, 11 Tex. 170; *Crosley v. Calhoon*, 45 Iowa, 557. But the personal property of a decedent goes by operation of law to the administrator, and the title thereto must be derived through him: *Winkle v. Winkle*, 8 Or. 193; *Weider v. Osborn*, 20 Or. 307 (25 Pac. 715). The question was directly involved in *Winkle v. Winkle*, where it was held that the county court has exclusive jurisdiction over the distribution of personal property of deceased persons, and, if there be an antenuptial contract which affects such property, it should be proved, and the rights of the parties thereunder determined by the county court. Mr. Justice Boise, in speaking

for the court, said: "The title to the personal property of a deceased person must be derived from the administrator through the orders of the court, and the orders of said court and the distribution made under them of personal property are binding on all persons who are interested in the estate, provided such orders are regular and in due form of law. The antenuptial contract set out in this case should have been proven in the probate court, and the rights of the parties affected by it there determined; and, if the parties were not satisfied with the proceedings there had, then either could have appealed to the circuit court. If they neglected to appeal, the decree of the probate court became final, and is not subject to be reviewed in a court of equity."

3. The distribution by a county court of the personal property of a deceased person is in the nature of a proceeding *in rem*, and, like all proceedings of that kind, is not only binding, where the statutory notice has been given, on the parties who actually appeared in the case, but on all others. When acting within its jurisdiction, and after due notice, its decrees on the distribution of personal property, like adjudications of prizes and forfeitures, and matters of collision in admiralty cases, and orders in proceedings of insolvency and bankruptcy, are conclusive upon all persons. "A proceeding for distribution," says Mr. Justice HARRISON, "is in the nature of a proceeding *in rem*; the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim as if his claim, after pre-

sentation, had been disallowed by the court": *William Hill Co. v. Lawler*, 116 Cal. 359 (48 Pac. 323). See, also, 2 Black, Judgm. § 633; 2 Freeman, Judgm. (4 ed.) § 581; 2 Woerner, Adm'n (2 ed.), § 561; *Goad v. Montgomery*, 119 Cal. 552 (51 Pac. 681, 63 Am. St. Rep. 145); *Bramell v. Cole*, 136 Mo. 201 (37 S. W. 924, 58 Am. St. Rep. 619); *Exton v. Zule*, 14 N. J. Eq. 501. Under Hill's Ann. Laws, § 3136, the state is entitled to maintain any action, suit, or proceeding necessary for the enforcement or protection of its rights in the matter of escheated property in like manner and with like effect as any natural person, so that it could have appeared in the county court and there presented for adjudication the question as to whether McCann died without heirs. The notice published in obedience to the orders of the county court upon the filing of Cooper's final account was sufficient notice to it and all other parties interested to render the decree of distribution, which was necessarily a part of the final settlement of the estate, conclusive, until reversed or set aside in some direct proceeding. The fact that Cooper was removed pending the settlement, and Logan appointed as his successor, could not destroy the virtue or efficacy of the previous notice, or render it necessary to give another. At the time of Cooper's removal the estate had been fully administered, and the final account filed. Nothing remained to be done with the property in controversy except to distribute it among the parties legally entitled thereto. The court had jurisdiction and custody of the property, and by the notice the statutory requirements were complied with, and all persons given their day in court, and this was all the law required: 2 Woerner, Adm'n (2 ed.), § 505; *Kearney v. Kearney*, 72 Cal. 591 (15 Pac. 769). Unless, therefore, the jurisdiction of that court was ousted by the mere filing of the information in the escheat proceeding, the order of final distribution is conclusive.

4. By the statute the county court is given exclusive jurisdiction in the first instance over the administration of the estates of deceased persons, and the distribution of the personal property thereof, and we think it immaterial to consider whether

the legislature can constitutionally deprive it of such jurisdiction. As we construe the escheat law, it does not undertake to interfere in any way with the jurisdiction of the county court in probate matters, or with the jurisdiction of any other court, lawfully acquired. It nowhere provides that the filing of an information in the circuit court to escheat personal property of the decedent will oust the county court of a previously acquired jurisdiction to settle the estate of the deceased, or vest in the circuit court the right to determine questions which by law belong exclusively to the county courts. Prior to 1887 it was made the duty of the administrator, under the direction of the county court, to sell property belonging to the estate, and pay the net proceeds thereof into the treasury of the state, whenever the administration had been completed and there were no known heirs, or in case the heirs did not claim the property within six months thereafter: Deady & Lane's Gen. Laws, p. 582. By the act of 1887 (Hill's Ann. Laws, § 3135, *et seq.*) the county court was relieved of that duty. But the act referred to does not in any way interfere with its jurisdiction in transacting probate business to proceed to the final settlement of an estate, and the adjudication of such questions as necessarily arise therein. Determining whether property has escheated to the state, and deciding the questions involved in such a proceeding, constitute no part of the ordinary duties of a probate court, and the act of 1887 was simply designed to transfer the general right to adjudicate upon such matters to the circuit court. It was intended to provide a method of procedure by which it may be judicially determined that the property of an intestate dying without heirs has escheated to the state. But any proceeding commenced for that purpose must necessarily be in subordination to the rules of law essential to the orderly administration of justice. It is a familiar principle that, where a court has acquired jurisdiction over the subject-matter and the parties in interest, it is its duty to proceed with the consideration of the matters presented to final determination, unless it is prevented from doing so by an injunction or some other legal process rendering such proceeding impracticable. A simple objection,

or an objection followed by the commencement of some action or proceeding in another court, will not justify a delay or the refusal to exercise its own rightful authority. This rule has peculiar force when applied to the proceedings of a county court in the transaction of probate business. An administrator is an officer of that court, and takes possession of the estate in obedience to its orders, and such possession can not be disturbed by process out of another court: *Byers v. McAuley*, 149 U. S. 608 (13 Sup. Ct. 906); *Blake v. Butler*, 10 R. I. 133; *Pitkin v. Pitkin*, 7 Conn. 315 (18 Am. Dec. 111); *In re Stilwell*, 68 Hun. 406 (23 N. Y. Supp. 65).

It is not reasonable to suppose that the legislature intended that the mere commencement of an escheat proceeding by direction of the governor should have the effect to oust the previously acquired jurisdiction of a county court to proceed to the final settlement of an estate, and the distribution of the personal property belonging thereto. It is only "the residue" of the personal property of one dying without heirs, after "the payment of the debts of the deceased, and the charges and expenses of administration," that escheats to the state (Hill's Ann. Laws, § 3099), and such residue can only be determined after an administration in the county court. If the legislature had intended to make such a radical innovation in the law governing the jurisdiction, powers, and duties of a county court in probate matters as is contended for by the plaintiff, it, no doubt, would have clearly so provided; but, not having done so, the courts ought not to resort to some ingenious construction of the law to accomplish such a result. If a circuit court, through a receiver or otherwise, can take the property of a decedent out of the hands of an administrator, and proceed to make a final disposition thereof, it could and would prevent the payment of funeral charges, expenses of last sickness, debts, and other claims against the estate, as provided for in the statute (Hill's Ann. Laws, § 1183), and would also prevent an administrator from settling his account (Hill's Ann. Laws, § 1175) and obtaining an order exonerating him and his bondsmen from further liability. An administrator is charged with property coming into

his hands belonging to his intestate (Hill's Ann. Laws, § 1176), and he can only settle his accounts with and obtain his discharge from the county court appointing him. It seems clear to us, therefore, that the legislature did not intend that the mere commencement of an escheat proceeding in the circuit court should interfere with or in any way disturb pending proceedings in the county court.

It is not necessary for us to determine at this time whether, in case a county court, on final settlement of an estate, should ascertain and determine that the intestate died without heirs, it would be necessary to commence proceedings, under section 3137 of the statute, to obtain a judicial determination, binding on all the world (*Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585), that the property had escheated to the state. It is sufficient for the purposes of this case that the county court of Multnomah County had jurisdiction and authority to determine the question of heirship upon an application for final distribution of personal property of McCann's estate. It follows that the proceedings in the court below must be reversed, and it is so ordered.

REVERSED.

Decided 30 June, 1902; rehearing denied.

CROSSEN v. OLIVER.

[69 Pac. 308.]

41	505
42	212

INSTRUCTIONS SHOULD RELATE TO THE ENTIRE EVIDENCE.

1. It is not good practice for a trial judge to single out the testimony of a single witness, or the testimony on one point, and instruct the jury that it is not sufficient to warrant a verdict, when there is other testimony that may properly be considered in the same connection. The following is an example of the impropriety of such practice: In an action to recover land, defendant claimed title as purchaser under a judgment in his favor against a former owner; and plaintiff claimed under a deed from such owner executed prior to the judgment, but not recorded until after the judgment was docketed. The former owner testified that she told defendant before his judgment was rendered that she had sold the land, and there was other evidence that plaintiff was in possession thereof when such judgment was rendered. *Held*, that an instruction that the former owner's mere statement that she had sold the land, without any indication as to whom she had sold it, was not sufficient notice to prevent

defendant from being a purchaser without notice, was properly refused, as being upon a single item of testimony, when there was other testimony on the same subject.

APPEALABLE ORDER—DENIAL OF NEW TRIAL.

2. A motion to set aside a verdict and for a new trial based upon insufficiency of evidence, being addressed to the discretion of the trial court, is not assignable as error on appeal; other steps, such as a motion for nonsuit or for an instructed verdict, being necessary in order to obtain an appealable order upon the sufficiency of evidence.

LEGITIMATE ARGUMENT OF COUNSEL TO THE JURY.

3. Much latitude must necessarily be allowed counsel in presenting a case to the jury, but so long as the argument is confined to the facts and legitimate deductions therefrom, it is not objectionable; thus, a reference to plaintiff as a poor laborer, whose brow was wet with honest sweat, and whose horny hands were rough from toil, coupled with a designation of plaintiff's grantor as a rich and grasping lawyer, is not an abuse of the privilege of counsel.

From Union: ROBERT EAKIN, Judge.

Action by M. S. Crossen against E. W. Oliver. From a judgment in favor of plaintiff, defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Turner Oliver* and *Thos. H. Crawford*, with an oral argument by *Mr. Oliver*.

For respondent there was a brief and an oral argument by *Mr. Eugene Ashwill* and *Mr. J. D. Slater*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an action for the recovery of real property. The plaintiff had a verdict and judgment, and the defendant appeals. The appeal is based upon alleged errors of the trial court in refusing two instructions requested, overruling a motion to set aside the verdict and for a new trial, and in permitting the attorney for plaintiff, in his argument to the jury, to argue from facts, no evidence of which had been adduced at the trial.

1. The first instruction requested and refused is as follows: "I instruct you further, gentlemen, that the mere statement of Mrs. Caldwell that she had sold the land, unless she indicated to whom she sold it, was not such notice as the law requires."

The second, although differently expressed, is to the same purpose. Both parties claim title through Mrs. Caldwell,—the defendant, as a purchaser at an execution sale upon a judgment against her in his favor; and the plaintiff, by a deed from her executed before said judgment, but not recorded until after it was docketed. Mrs. Caldwell testified that she told Oliver before the judgment was rendered that she had sold the land, the purpose of which was to charge him with notice of plaintiff's title; Oliver claiming to be an innocent purchaser through his judgment. There is some other evidence in the record, intended to supplement this testimony, which was offered and admitted for the purpose of showing that Crossen was in possession of the land at the time Oliver obtained his judgment; thus affording constructive notice of his title, although his deed was not recorded. With this understanding, it is apparent that the instructions requested were directed against a single item of the testimony intended to establish notice as to Oliver, and for this reason were properly refused. It is not good practice to single out the testimony of one witness, or to point to a single item of testimony, and instruct the jury that it is not sufficient to warrant a verdict, when there is other evidence in the case which could rightfully be considered in the same relation. The testimony of Mrs. Caldwell referred to in the instruction, was not all the testimony going to the same point; and it was proper, therefore, that it should be submitted to the jury, in connection with such other testimony, and not made the subject of a separate instruction upon the question of notice. As supporting this view, see *Church v. Melville*, 17 Or. 413 (21 Pac. 387); *Wohlwend v. Weingardner*, 19 Ky. Law Rep. 429 (40 S. W. 928); *Dawson v. Falls City Boat Club*, 125 Mich. 433 (84 N. W. 618, 622).

2. The next question arises upon defendant's motion to set aside the verdict and for a new trial; his contention being that the evidence adduced as to notice of Crossen's prior title was not sufficient in law upon which to submit the case to the jury. If counsel desired an appealable order on this question, a motion for nonsuit, or to instruct the jury to find for the defendant,

interposed at the proper time, would have been appropriate; but a motion to set aside the verdict and for a new trial is not adequate for the purpose under our practice. It has been so frequently decided by this court that such a motion, based upon insufficiency of evidence to support the verdict, is addressed to the sound discretion of the trial court, and is not assignable as error upon appeal, that it is unnecessary to re-examine or discuss the question now; and we rest the matter by a simple notation of the cases by which the law is established: *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537, and cases cited); *State v. Childers*, 32 Or. 119 (49 Pac. 801); *State v. Gardner*, 33 Or. 149 (54 Pac. 809); *McCormick Mach. Co. v. Hovey*, 36 Or. 259 (59 Pac. 189); and *State v. Crockett*, 39 Or. 76 (65 Pac. 447).

3. The next question goes to the argument of plaintiff's counsel to the jury. The cause of the complaint is that counsel told the jury that plaintiff worked sixteen hours a day for a whole year for this land, and now, if they took it away from him, he would lose his whole year's work; that he was a poor, hard-working man; that Turner Oliver (defendant's attorney) was rich and grasping, and wanted to take this land, and deprive a poor laborer of his wages; that his client earned his living by the sweat of his brow, and his hands were horny with honest labor, while Turner was a lawyer; and, to illustrate his point, he related a humorous story, from which it was inferable that no lawyer could be honest. It is insisted that this argument is vulnerable to the criticism that it consists of a statement of facts, pertinent to the issues, not in evidence. An attorney, in presenting his case to the jury, is accorded a large degree of freedom, and is entitled to draw from the testimony adduced all legitimate inferences of which it is susceptible, and to employ such illustration and demonstration as to him may seem best suited to direct the attention of the jury to the point intended for emphasis. Some of the counsel's inferences may have been farfetched and somewhat remote, but the argument was not obnoxious to the objection that it went beyond the facts in evidence: *Huber v. Miller*, 41 Or. 103 (68 Pac. 400).

These considerations affirm the judgment of the court below,
and it is so ordered. **AFFIRMED.**

Argued 18 June; decided 7 July, 1902.

REED v. DUNBAR.

[69 Pac. 451.]

41	509
46	332

MANDAMUS—EFFECT OF DEMURRER—JUDICIAL NOTICE.

1. The question whether an office has been abolished may be determined on appeal from an order sustaining a demurrer to an alternate writ of mandamus to compel the payment of the salary of the official, though the writ alleges that the officer is duly qualified, commissioned and acting, as the court will take judicial notice of the statute.

FISH LEGISLATION—REPEAL BY IMPLICATION—STATUTES.

2. Under the familiar rule that where there are repugnant acts upon the same subject, and the latest one revises the subject in such a way as to plainly evidence a legislative intention to substitute it for the earlier law or laws, the latest law repeals the others by implication, it must be held that the law of 1901 relating to fishes and fishing (Laws, 1901, pp. 328, 349), repealed the law of 1898 *in toto*.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE FUNCTIONS.

3. The power to appoint to a public office is often exercised by legislative bodies, but it is not a constitutional power which cannot be delegated, like the power to make laws, and an act creating a board with power to appoint certain officers and agents is not void because it attempts to delegate constitutional powers; for example, the law of 1901, regulating the fish industry of the state and creating a Board of Fish Commissioners, is not unconstitutional, as being a delegation of legislative powers, in authorizing the commissioners to appoint a master fish warden.

From Marion: REUBEN P. BOISE, Judge.

This is a mandamus proceeding by F. C. Reed against F. I. Dunbar, to compel the defendant, as secretary of state, to draw a warrant in favor of the plaintiff for salary alleged to be due him as fish commissioner for the month of March, 1901, and for expenses which it is asserted he incurred in the discharge of his duties during the same time. The alternative writ alleges, in substance, that in April, 1899, the plaintiff was appointed fish commissioner, in pursuance of the provisions of an act of the legislature, approved October 18, 1898, for the term ending October, 1902, at an annual salary of \$2,500, payable quarterly,

and was allowed necessary expenses incurred in the performance of his duty, not to exceed \$1,700 per annum; that in April, 1901, he presented to the defendant, as secretary of state, his claim for services rendered during the quarter ending March 31, 1901, amounting to \$625, salary, and \$43.10, expenses; that the defendant refused to allow such claim, or any part thereof, except an amount sufficient to cover his salary and expenses for the months of January and February; that the plaintiff is the duly qualified, commissioned, and acting fish commissioner of the state; and that there is still due him the sum of \$208.33 as salary, and \$18.80 as expenses incurred in the performance of his duty. A demurrer to the alternative writ was sustained on the ground that the office of fish commissioner was abolished by the legislative assembly of 1901, and ceased to exist on the 1st of March of that year.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Cicero M. Idleman*.

For respondent there was a brief and an oral argument by *Mr. D. R. N. Blackburn*, Attorney General, and *Mr. Charles W. Fulton*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is insisted that the question of the repeal of the act under which the plaintiff was appointed cannot be considered, because the case comes here on demurrer to the alternative writ, which alleges that he is the duly qualified, commissioned, and acting fish commissioner of the state. But we are of the opinion that, if the act has been repealed and the office abolished, the court will take judicial notice of that fact. And moreover, if the judgment is to be put upon a technical ground, it is by no means certain that the alternative writ states a cause of action. By a recent act of the legislature (Laws, 1901, p. 293) it is provided that no warrant shall be drawn by the secretary of state in payment of any claim against the state unless an appropriation has first been made for the payment thereof; and it is doubtful

whether an alternative writ of mandamus to compel the secretary of state to draw a warrant in payment of such a claim states a cause of action, unless it alleges that an appropriation has been made for the payment thereof. We prefer, however, to put the case upon the real question involved, rather than upon mere technical grounds.

2. In 1898 the legislature passed an act to provide for the propagation and protection of chinook and other species of salmon, sturgeon, and food fishes in the rivers and waters of the state; to license and regulate those engaged in taking fish, the devices and appliances used for that purpose, and all persons engaged in canning or dealing in fish; and to provide for the appointment of a fish commissioner and deputies, the defining of their duties, and the fixing of their compensation: Laws, 1898, p. 37. This act consists of 44 sections, defines the close season, makes it unlawful to catch or take fish, or to have in possession, sell, or offer for sale or transportation, or to transport, any fish caught during such season; provides for the appointment by the governor of a fish commissioner for a term of four years, at an annual salary of \$2,500, payable quarterly; makes it the duty of the fish commissioner to devote his time to the fishing industry of the state; gives him management of the state hatcheries; and requires him to see that all laws for the protection, preservation, and propagation of food fishes are enforced; requires him to issue all licenses for fishing, packing, or dealing in fish, and pay the money received therefor over to the state treasurer, to the credit of the hatchery fund; authorizes him to propagate and stock the various streams of the state with salmon and other food fishes, and for that purpose gives him power to close any stream. In 1901 the legislature passed another act, entitled "An act to provide for the better protection of chinook, steel-heads, and all other anadromous species of salmon and other fish; and for the better protection of the fishing industry in this state and the regulation and control thereof; to regulate the time and appliances for the taking of the same; to provide for the creation of a board of fish commissioners and other officers pertaining to the fishing industry in this state;

to provide for the construction and maintenance of fish hatcheries in the State of Oregon and adjoining states; and to repeal certain laws in this act designated, and all acts and parts of acts in conflict therewith": Laws, 1901, p. 328. This act consists of 54 sections, and covers the entire subject of the fishing industry of the state. It contains, however, no repealing clause, and the question for decision is whether it repeals the act of 1898 by implication.

It is a familiar rule that repeals by implication are never favored, and, when there are two acts upon the same subject, effect will be given to both, if possible. But when they are repugnant, so that both cannot stand, or if the new statute revises the whole subject-matter of an existing law, and is plainly intended as a substitute therefor, it will operate as a repeal of the old law, even though it contains no express provision to that effect: *Little v. Cogswell*, 20 Or. 345 (25 Pac. 727); *Continental Ins. Co. v. Rigger*, 31 Or. 336 (48 Pac. 476); *Ex parte Ferdon*, 35 Or. 171 (57 Pac. 376). If, therefore, the act of 1901 revised the whole subject embraced in the act of 1898, and was intended as the final expression of the legislative will, it operated as a repeal thereof, although it contains no express words to that effect. A glance at its provisions will show that it was so intended. It defines in detail the close season in the various streams; provides a penalty for catching fish during such season; regulates the construction and maintenance of traps, weirs, and other fixed appliances for catching fish; creates a board of fish commissioners, consisting of the governor, secretary of state, and state treasurer; makes it the duty of this board to appoint a master fish warden, one deputy fish warden, and water bailiffs; defines the duties and compensation of such officers; requires and authorizes the board of fish commissioners created by the act to locate and provide for the construction of fish hatcheries, and to have general control thereof; requires all moneys received under the act to be paid into the hatchery fund, and used for hatchery purposes under their direction; and makes it the duty of the master fish warden to issue all licenses for fishing, packing, or dealing in fish; requires him to keep a record thereof,

and make a detailed report to the board annually; authorizes the board of fish commissioners to propagate and stock the various waters and streams of the state with salmon and other food fishes, and, to that end, empowers them to prohibit the taking of fish from such streams. In short, it is manifestly intended to impose upon the board of fish commissioners and the officers appointed by them the duties theretofore required of the fish commissioner. Under the well-settled rules of statutory construction, it therefore operated as a repeal of the former act upon the subject.

It is argued that the striking out by the legislature of the repealing clause of the act of 1901, and the passage of a separate act at the same session for the payment, out of the moneys collected by the fish commissioner, of a bounty for killing seals and sea lions (Laws, 1901, p. 156), manifests a purpose not to abolish that office. The legislative journals show that the bill as it passed the house of representatives was a substitute for the original bill, and contained a section repealing certain laws which had already been repealed by the act of 1898: House Jour. 1901, p. 792. This section was stricken out by the senate (Sen. Jour. 1901, p. 799), but this does not indicate an intention not to make the act of 1901 a substitute for that of 1898. The act for the payment of a bounty for killing seals, sea lions, etc., provides, in substance, that a sum not to exceed \$5,000 a year, out of the moneys paid into the state treasury by the fish commissioner, shall be placed in a separate fund, to be known as the "Fishery Bounty Fund," out of which there shall be paid a bounty for killing the animals named. The act further provides that any one killing or causing to be killed any of the animals for which the bounty is given shall make proof thereof before the fish commissioner, who shall issue to such person a certificate, as evidence of his right to receive from the state treasury the amount of the bounty, upon the presentation of which the secretary of state is required to issue a warrant on the fishery fund for the amount of the certificate. The evident purpose of this law was to provide for the payment of the

bounty out of the money received for licenses and fines under the act regulating the fishing industry in the state, and that persons entitled to payment from such fund should make proof thereof to the officer charged with the duty of enforcing the fishing laws. It is therefore quite probable, under the rule that, where the subject-matter and general intent of a legislative act is once ascertained, words may be modified, altered, or supplied so as to carry out such intention, that the words "fish commissioner" will be construed to mean "master fish warden": *Sutherland*, Stat. Const. § 218. But however that may be, it cannot, we think, be said that the passage of the bounty act indicated the intention of the legislature to preserve the office of fish commissioner separate and distinct from that of master fish warden, as provided in the act of 1901.

3. It is also argued that the act of 1901 is unconstitutional and void because it delegates to the Board of Fish Commissioners the power and authority to appoint a fish warden. It is undoubtedly true that the legislature cannot delegate powers conferred upon it by the constitution, but the appointment to an office is not one of such powers. The appointment to public office may, under certain circumstances, be made by the legislature, but it is not a duty imposed upon it by the constitution. The rule invoked refers to the lawmaking power. Every law, after it is enacted, however, must be executed by some one charged with that duty; and, unless the constitution otherwise especially directs, the legislature may vest such power in a board or commission, and give to that board or commission the right to appoint subordinate officers or agents to carry out the legislative will: *State ex rel. v. George*, 22 Or. 142 (29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586); *Cooley*, Const. Lim. (5 ed.) 135.

We are of the opinion, therefore, that the law of 1901 is valid, and that it operated to repeal the act of 1898 under which the plaintiff was appointed. The judgment of the court below will therefore be affirmed.

AFFIRMED.

Argued 6 November; decided 24 November, 1902.

STATE v. DALY.

[70 Pac. 706.]

INDICTMENT FOR RESCUE—ALLEGATION OF INTENT TO ESCAPE.

1. An information under Section 1833 of Hill's Ann. Laws for aiding a prisoner to escape contains a sufficient allegation of intent when it alleges that defendant "did willfully, unlawfully, and feloniously assist * * in an attempt to escape" from a county jail, for it alleges co-operation in an actual effort to escape, which could not have existed without the intent by the prisoner to escape.

INDICTMENT—CHARGING GUILT OF PRISONER.

2. An information for aiding a prisoner in an intent to escape need not allege the facts showing the prisoner's guilt; it will be sufficient to state that the prisoner was lawfully detained in the stated place of confinement.

From Marion: GEORGE H. BURNETT, Judge.

John Daly was convicted of aiding another to escape from legal confinement, and appeals.

AFFIRMED.

For appellant there was a brief over the names of *Carson & Adams*, with an oral argument by *Mr. Loring K. Adams*.

For the State there was a brief and an oral argument by *Mr. D. R. N. Blackburn*, Attorney General, and *Mr. Julius N. Hart*, District Attorney.

MR. JUSTICE BEAN delivered the opinion.

1. The defendant was tried for and convicted of aiding another to escape from legal confinement. The essential parts of the information are as follows:

"That the said John Daly on the 26th day of April, A. D. 1902, in the County of Marion and State of Oregon, then and there being, did then and there willfully, unlawfully, and feloniously assist one Ralph Bland in an attempt to escape from the Marion county jail (a place where prisoners were then and there duly confined and held in the custody of the sheriff of said county), by then and there sawing and cutting the iron bars of said jail, with the intent then and there to effect, by sawing and cutting said bars, the escape of the said Ralph Bland, the said Ralph Bland being then and there duly and legally committed and de-

tained in said jail upon a commitment issued by J. O'Donald, Justice of the Peace for Salem District, in Marion County, Oregon, upon a charge of larceny in and from an office of two railroad tickets, the property of the Southern Pacific Company, of the value of \$54.90, the said John Daly then and there well knowing that the said Ralph Bland was then and there in legal custody, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

The information is based on Section 1833, Hill's Ann. Laws, which provides: "If any person shall convey into or about the yard or grounds of any penitentiary, jail, house of correction, or other place whatever for the confinement of persons upon any warrant, order, or other legal process, any disguise, material, instrument, tool, weapon, or other thing adapted to or useful in aiding any person or prisoner there committed or detained, with intent to effect or facilitate the escape of such person or prisoner, or shall by any means whatever aid or assist any such person or prisoner in an intent to escape, whether such escape be effected or attempted or not, such person, upon conviction thereof, shall be punished as in the following section provided." A glance at the information will show that the first part of the section quoted is not applicable to the case in hand, but the relative parts are that if any person "shall by any means whatever aid or assist any such person or prisoner in an intent to escape, whether such escape be effected or attempted or not, such person, upon conviction thereof, shall be punished," etc.

The objection to the information made after verdict is that it does not state a crime, because it is not alleged that Bland, whom the defendant is charged with having aided or assisted to escape, had at the time an intent to do so. That such an intent is an essential ingredient of the crime charged against the defendant, and should be averred, is unquestioned, but it is substantially so alleged. The information charges that the defendant assisted Bland in an attempt to escape, by doing certain specific acts. As he could not assist in an attempt to escape unless such attempt was actually made, the allegation is sufficient, after verdict, that Bland in fact attempted to escape, and, as an attempt to escape necessarily involves an intent to do so,

it follows that he had such an intent. There is, of course, a distinction between an intent and an attempt. Intent is a quality of the mind, and implies a purpose only, while an attempt implies an effort to carry that purpose into execution; but there can be no attempt until there has been an intent. Mr. Bishop says: "An attempt always implies a specific intent, not merely a general mental culpability. When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it, and proceeded a certain way in the doing. The intent in the mind covers the thing in full. The act covers it only in part": 1 Bish. Cr. Law (5 ed.), § 729. An attempt, therefore, embodies both the intent to do a thing, and a direct ineffectual act done toward its commission: 1 McClain, Cr. Law, § 222. Hence the charge of an attempt necessarily includes and is equivalent to a charge of an intent to accomplish what was intended: *Johnson v. State*, 14 Ga. 55; *Prince v. State*, 35 Ala. 367. We are of the opinion, therefore, that the information sufficiently charges that Bland had an intent to escape.

2. Again, it is insisted that the information is insufficient because it does not adequately appear therefrom that Bland was confined in the jail under a commitment upon a proper charge of larceny, since the facts constituting the larceny are not set out. The information shows, substantially, that Bland was confined in the jail under a commitment issued by a justice of the peace upon a charge of larceny from an office; and this, in our estimation, was quite sufficient: *Gunyon v. State*, 68 Ind. 79; *State v. Addcock*, 65 Mo. 590. Bland's guilt or innocence of the crime for which he was committed was a wholly immaterial inquiry on the trial of the defendant. It was sufficient that he was lawfully committed to or detained in the jail, and it would be no defense for the defendant that Bland was in fact innocent of the offense for which he was imprisoned: *State v. Lewis*, 19 Kan. 260. That was a question for the court before which he might be called to answer. If it adjudged that he was innocent, he would be discharged without the aid or assistance of the defendant. The judgment of the court below is affirmed.

AFFIRMED.

Argued 23 June; decided 7 July, 1902.

LAWREY v. STERLING.

[69 Pac. 460.]

MORTGAGING PROPERTY OF ESTATES—STATUTORY CONSTRUCTION.

1. The statute of 1898 authorizing executors and administrators to redeem real estate property sold on foreclosure or execution, and providing that the executor or administrator, with the consent of the county court, may borrow money on estate real property, and execute a mortgage thereon for the purpose of funding the indebtedness against the estate (Laws, 1898, p. 34, §§ 1 and 2), is not in conflict with Const. Or. Art. IV, § 20, providing that every act shall embrace but one subject and matters properly connected therewith; the subject of this act being the granting of power to executors or administrators to borrow money on the property of the estate, and the other power, that of redemption, a mere incident thereto.

ORDER TO MORTGAGE AN ESTATE—COLLATERAL ATTACK—JURISDICTION.

2. An order of a county court authorizing an administrator to mortgage the real property of an estate, based on a verified petition setting forth all the facts required by the statute to exist before such an order can be made, see Laws, 1898, p. 34, § 2, is conclusive, in case it is attacked collaterally, if the county court had jurisdiction to administer the estate, notwithstanding the application for permission to sell was by a petition, while the statute provides that the court may act when certain facts are "shown by affidavit."

COLLATERAL ATTACK ON AVERMENTS OF THE PETITION.

3. Where the petition by an administrator to borrow money on estate property to pay debts, as authorized by Laws, 1898, p. 34, states facts showing the need of a certain sum, an objection that the record of the court showed that it was unnecessary to borrow so large a sum will not be considered on collateral attack.

IMPLIED AUTHORITY OF ADMINISTRATOR TO GIVE NOTE FOR LOAN.

4. Under the familiar principle of statutory interpretation that, whenever a right is granted by law, the power necessary to make the right available is also impliedly conferred, a statute authorizing executors and administrators to mortgage the real property of estates (Laws, 1898, p. 34, § 1), confers also the authority to execute a promissory note for the loan, with such provisions as are in common use in the community, which, in Oregon, would include a promise to pay an attorney fee in case of suit or action.

POWER OF EXECUTOR TO BORROW MONEY—STATUTORY CONSTRUCTION.

5. A statute such as Laws, 1898, p. 34, § 2, authorizing executors or administrators to mortgage the real property of estates "for the purpose of funding the indebtedness," does not in any way make the number of creditors a factor in the question of the right to mortgage—it can be exercised to pay the debt of one creditor, or many.

IMPLIED POWER OF STATE LAND BOARD.

6. The State Land Board, which is authorized to loan the irreducible school fund, may assign a promissory note and a mortgage given to secure it, though such power of assignment is not expressly conferred by statute.

From Union: ROBERT EAKIN, Judge.

This is a suit by M. A. Lawrey to foreclose a mortgage. The facts are that, M. Sterling having died seised of certain real property in Union County, Oregon, the county court thereof appointed J. L. Caviness administrator of his estate, who, having duly qualified, filed in said court a verified petition, in pursuance of which he secured an order authorizing him to procure a loan of \$2,484, to pay a certain claim against the estate and the expenses of administering thereon, and to give a mortgage on said land as security for the loan. He thereupon borrowed from the State Land Board, October 23, 1900, the sum of \$2,084 belonging to the irreducible school fund; executing a promissory note therefor in his representative capacity, payable in one year, with interest at 6 per cent per annum; stipulating therein to pay a reasonable sum as attorney's fees, in case suit should be instituted to collect the same; and giving a mortgage on said real property to secure the payment of the note. The mortgage having been recorded, the note was assigned to the La Grande National Bank, which transferred it to plaintiff, who commenced this suit to foreclose the lien; making George W. Sterling, Schuler Sterling, Mary T. Jackson, and Henry V. Sterling, heirs of said deceased, and J. H. Lawrey, Thomas Wade, and A. Ferguson, defendants; alleging in the complaint that such heirs were the owners in fee of said premises, and that the other defendants claimed some interest therein, but, if any such they had, it was inferior to plaintiff's lien. The defendants Henry V. Sterling, Thomas Wade, and A. Ferguson, alone answered; denying each allegation of the complaint except the appointment and qualification of the administrator, and that said heirs were the only persons inheriting said property. A trial being had, the court found that there was due on the note the sum of \$2,267.74, and that \$200 was a reasonable sum as attorney's fees, and decreed a foreclosure of the mortgage, from which the defendants so answering appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Turner Oliver*.

For respondent there was a brief over the names of *James A. Fee* and *John H. Lawrey*, with an oral argument by *Mr. Lawrey*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The court having admitted in evidence, over the defendants' objection and exception, the order of the county court of Union County licensing the administrator to secure a loan and to give a mortgage on the real property of the decedent's estate as security therefor, the note and mortgage executed in pursuance of such authority, and the written assignment thereof to the La Grande National Bank, it is contended that the statute under which said order was made violates the organic law of the state; that the method prescribed for invoking the power of the county court to grant such order was not pursued; and that the State Land Board had no authority to assign the note and mortgage, and hence the court erred in admitting the evidence so objected to.

1. Considering the objections in their order, the constitutional provision claimed to have been violated is as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title": Const. Or. Art. IV, § 20. The statute in question, including the title, is found in Laws, 1898, p. 34, and reads as follows:

"An act to authorize executors and administrators to redeem real estate sold under decree or judgment, and to borrow money upon the property of the estate, to facilitate the settlement of the estates of decedents.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That hereafter it shall be lawful for any executor or administrator of an estate of any decedent to redeem, for the benefit of the estate, any real estate belonging to the estate which may at any time hereafter be sold at public auction, either by

decree of court on foreclosure of mortgage or upon judgment, in the same manner and upon the same terms that property may be redeemed by any debtor.

"Sec. 2. That it shall be lawful for any executor or administrator, at any time hereafter, with the consent of the county court within whose jurisdiction such property may lie, to borrow money upon any property belonging to the estate, and to execute a mortgage thereon as security, for the purpose of funding the indebtedness against the estate, when it is shown by affidavit that the money can be secured for the same or a less rate of interest than that already paid, and for the further purpose of paying the interest on outstanding obligations that are liens on premises to be mortgaged when it is shown by affidavit to be necessary, whether said property has or has not before that time been mortgaged by the decedent or his executor or administrator.

"Sec. 3. That all acts and parts of acts in conflict with the foregoing be and the same are hereby repealed."

Approved October 15, 1898.

It is argued that this act embraces two disconnected subjects, both of which are expressed in the title, viz.: To empower the executor or administrator to redeem real property belonging to the decedent's estate that may be sold at public auction under a decree or judgment; and also to authorize him to borrow money on the property of the estate, giving a mortgage thereon as security. The object of the constitutional mandate that "every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title," was to prevent matters wholly foreign to the subjects specified in the title from being inserted in the body of the act: *Simpson v. Bailey*, 3 Or. 515; *McWhirter v. Brainard*, 5 Or. 426. An examination of the original bill (House Bill No. 58), on file in the office of the secretary of state, shows that it was entitled, "A bill for an act to facilitate the settlement of the estates of decedents." Section 2 thereof was as follows: "That it shall be lawful for an executor or administrator, at any time hereafter, with the consent of the county court within whose jurisdiction such property may lie, to borrow money upon any property belonging to the estate and to execute a mortgage thereon as security, whether said property has or has not before that time

been mortgaged by the decedent or his executor or administrator." The judiciary committee of the house of representatives, to which the bill was first referred, recommended an amendment thereto, which, upon motion, was adopted (House Jour. 1898, p. 222), and became section 2 of the act, no other changes having been made in the original bill except the title, which was amended (House Jour. 1898, p. 128), as hereinbefore quoted. A comparison of the original bill with the act as passed discloses that the only amendment adopted contains a statement of the purposes for which money may be borrowed, and prescribes the method whereby the consent of the county court may be secured. The act does not, in express terms, authorize the borrowing of money with which to redeem real property belonging to the decedent's estate, that may have been sold under a decree or judgment; but, as a lien of this character is an indebtedness against said estate, the right to borrow money for the purpose of funding such indebtedness necessarily carries with its exercise a grant of power to borrow money to be used in redeeming real property from such sales. An analysis of the language of the act, so construed, shows that its subject is to authorize the borrowing of money on the property of a decedent's estate, to redeem it from sale under a decree or judgment, or to fund other indebtedness against the estate, including interest on outstanding obligations that are liens on the premises to be mortgaged. Without the power to borrow money, it might be impossible to redeem such real property from sale, but by the method prescribed, the legislative assembly has wisely provided a means whereby premises sold for an inadequate sum may be saved to the heirs, and the day of immediate payment of a debt postponed; thereby possibly tiding the property over the period of a ruinous panic. So, too, an exercise of the authority to borrow money to be used in funding the indebtedness of a decedent's estate may prevent a sale of the property at an inopportune time; thereby retaining the title until, possibly, the rents and profits pay the mortgage necessarily placed thereon by the executor or administrator, whereupon the heirs may take the premises freed from all obligations. The subject of the act under consideration is,

therefore, the granting of power by the county court to an executor or administrator to borrow money, and the incident to the exercise of such power is the right to use the money so borrowed in paying the indebtedness against the estate of a decedent, including the redemption of the real property thereof that may be sold under a decree or judgment. The purpose for which the money may be used is properly connected with an exercise of the power to borrow it. The title of the act might have been transposed so as to conform to the interpretation here given, but in the form adopted by the legislative assembly it fairly expresses the single subject of the act, and, so long as it does so, no reason exists for declaring the statute in contravention of the clause of the constitution invoked to establish its invalidity: *Anderson v. City of Camden*, 58 N. J. Law, 515 (33 Atl. 846); *David v. Portland Water Com.* 14 Or. 98 (12 Pac. 174); *State v. Koshland*, 25 Or. 178 (35 Pac. 32).

2. Did the administrator pursue the method prescribed by the act, so as to confer jurisdiction upon the county court to make the order authorizing him to borrow the money and to execute a mortgage as security therefor? It will be remembered that the statute empowers the county court to license an executor or administrator to borrow money upon the property belonging to the decedent's estate, and to give a mortgage thereon as security for the loan, when it is shown by affidavit that the money, to be used in funding the indebtedness against the estate, can be secured for the same or a less rate of interest than that already paid. The petition, filed by the administrator June 6, 1900, upon which the order of the county court is based, is as follows:

"In the County Court of the County of Union, State of Oregon.

"In the matter of the Estate of

M. Sterling, Deceased.

"To the Hon. B. F. Wilson, County Judge of Union County, Oregon:

"Comes now J. L. Caviness, and represents that he is the duly qualified and acting administrator of the estate of M. Sterling, late of Union County, Oregon, now deceased; that said estate has paid all claims and expenses due by the same with the exception

of balance of claim of J. L. Caviness, which was not a preferred claim, but presented after the first six months of administration, now amounting to the sum of \$1,884.00, together with the fees due the administrator of about \$600.00; that said claim is drawing interest at the rate of eight per cent per annum, and that a loan can be had on the lands of the estate at no greater rate, and probably for less, to wit: 7 per cent per annum; that, by obtaining a loan of \$2,484.00, the said claim may be fully paid, the administration closed, and the estate lands turned over to the heirs with such mortgage, and save further administration and expense; that it will be for the best interests of the said estate to obtain a loan upon the estate lands, and mortgage so much thereof as is necessary to obtain said loan, and pay said estate, and prevent further expense, so that the heirs may have said lands.

"Wherefore your petitioner, the said administrator, prays for an order and license empowering him to execute a mortgage on the estate lands, or so much thereof as shall be necessary, and close up said estate.

• "J. L. Caviness, administrator.

"STATE OF OREGON, County of Union, ss.:

"I, J. L. Caviness, being first duly sworn, say that I am the duly appointed, qualified, and acting administrator of the estate of M. Sterling, deceased, in said above entitled court, and the foregoing, my petition, is true, as I verily believe.

"J. L. Caviness.

"Subscribed and sworn to before me this 31st day of May, A. D. 1900.

[SEAL]

"C. H. Finn,

"Notary Public for Oregon."

It is argued that, as an executor or administrator at common law was powerless to mortgage the real property of a decedent, a statute conferring such authority should be strictly construed, and that, giving to the act under consideration such interpretation, a petition was ineffectual to invoke the jurisdiction of the county court to grant the license demanded, and hence an error was committed in decreeing a foreclosure of said pretended mortgage. An affidavit is a written declaration under oath, made without notice to the adverse party: Hill's Ann. Laws, § 803. In all affidavits and depositions, the witness must be made to speak in the first person: Hill's Ann. Laws, § 806. An affidavit

may be used in any case expressly provided by this code or other statute: Hill's Ann. Laws, § 808. The word "petition," as used in a statute, is generally understood to mean a written application, addressed to a court or judge, praying for the exercise of some judicial power, or to a public officer, requesting the performance of some duty enjoined upon him by law or the exercise of some discretion with which he is vested: *Bergen v. Jones*, 4 Metc. (Mass.) 371. While, according to the definition of the word "affidavit," as generally given (1 Ency. Pl. & Pr. 309; *Dewey v. Linscott*, 20 Kan. 684; *State v. Green*, 15 N. J. Law, 90; *Burns v. Doyle*, 28 Wis. 463), a distinction exists between it and a "petition," the question is, was the latter sufficient to invoke the jurisdiction of the county court, authorizing it to grant the license demanded, when the act under consideration specified that an affidavit was the means adopted by the legislative assembly for that purpose? Assuming that the county court of Union County acquired jurisdiction originally to grant administration upon the estate of M. Sterling, deceased, the proceeding for license to execute a mortgage on his property is a distinct and independent matter, in the nature of a suit, in which the written application is the commencement and the order granting the license is the decree: *Haynes v. Meeks*, 20 Cal. 312. In *Wright v. Edwards*, 10 Or. 298, Mr. Justice LORD, referring to a decree of this character, says: "When such an order is made, after jurisdiction has attached, it cannot be questioned collaterally, whatever errors or irregularities may intervene thereafter." Further in the opinion he says: "Where there is matter of substance upon which jurisdiction can hinge, mere errors or defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding when, by lapse of time, an appeal is barred, which has become the foundation of title to property. But the case is different where there is an entire want of facts, prerequisite to jurisdiction, disclosed upon the face of the petition." It is the averment of facts necessary to confer jurisdiction of the subject-matter, in a written application invoking an exercise of the court's authority, that warrants it in granting the measure

of power delegated: *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537). Jurisdiction, therefore, depends upon the allegation of material facts, and not upon the manner of stating them.

A fair construction of the act of October 15, 1898, warrants us in saying that it empowers the county court to license an executor or administrator to give a mortgage on the decedent's property as security for money borrowed, to be used for either of the following purposes: (1) To find the indebtedness against the estate, including the redemption of any of the decedent's real property that may have been sold under a decree of foreclosure or upon a judgment; and (2) to pay the interest on the outstanding obligations that are liens on premises to be mortgaged. The showing required to be made to secure an order of the court authorizing the representative of the decedent's estate to borrow money is, in the first instance, the existence of the indebtedness against the estate, and that money can be borrowed for the same or a less rate of interest than that already paid; and, in the second case, it would appear, though not involved in the case at bar, the existence of the outstanding obligations that are liens on the premises to be mortgaged, and that it was necessary to borrow the money for the purpose of paying such interest. The administrator's petition stated that the estate was indebted to him in the sum of about \$1,884, which was drawing interest at the rate of 8 per cent per annum; that the fees due him amounted to about \$600; and that money could be borrowed to pay said claim and expenses at the same or less rate of interest than he was receiving. The petition stated all the facts necessary to an exercise of the court's power, and certainly contained matters of substance upon which jurisdiction could hinge: *Wright v. Edwards*, 10 Or. 298. The county court, in the administration of estates, exercises its powers by means of an affidavit, or the verified petition or statement of a party (Hill's Ann. Laws, § 1078, subd. 2); and, while the rule is well settled that, in construing a statute, it is generally held that the inclusion of one mode means the exclusion of all others, we believe, in a collateral attack, where, as in the present instance, the petition avers such a state of facts as would confer jurisdic-

tion under the general statute, that jurisdiction of the subject-matter was thus secured notwithstanding an affidavit was not employed for the purpose, as prescribed by the special act. The county court of Union County is a court of record, and in probate matters, except when its decrees are brought up on writ of review or appeal (*Garnsey v. County Court*, 33 Or. 201, 54 Pac. 539, 1089; *Malone v. Cornelius*, 34 Or. 192, 55 Pac. 536), is invested with superior jurisdiction (Const. Or. Art. VII, § 12; Hill's Ann. Laws, § 895; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119; *Richardson's Guardianship*, 39 Or. 246, 64 Pac. 390); and, while it may have been exercising a statutory power in derogation of the common law, its jurisdiction was invoked according to the general rule, and hence jurisdiction attached, rendering its decree invulnerable to collateral attack.

3. It is maintained that the records of the county court show that it was unnecessary to borrow more than \$1,456, to discharge the indebtedness against the estate, and that the court erred in rendering a decree for a greater sum and the interest thereon. The point contended for is without merit, for, the petition having stated facts showing the need of borrowing the sum loaned, jurisdiction to license the execution of a mortgage therefor attached, and, this being so, the truth of the averment cannot be controverted on collateral attack: *Stuart v. Allen*, 16 Cal. 501 (76 Am. Dec. 551); *Griffin v. Johnson*, 37 Mich. 87.

4. It is argued that the statute does not authorize an administrator or executor to give a promissory note or promise to pay attorney's fees, and, this being so, the court erred in decreeing the recovery of any sum on account thereof. It is a familiar principle of interpretation that, whenever a right is granted by statute, that without which the right itself could not exist is also given by implication: Sutherland, Stat. Const. § 343. Thus, as stated by Mr. Jones in his work on Mortgages (4 ed.) § 129: "A power to mortgage given in general terms, without specifying the provisions the deed shall contain, includes the power to make it in the form and with the provisions customarily used in the state or county where the land is situated." Construing strictly the provisions of the statute authorizing an executor or

administrator to borrow money, as is the rule in determining a grant of power to a municipal corporation, could the personal representative of M. Sterling's estate issue, as evidence of the money borrowed, any instrument except the mortgage specified in the act? Notwithstanding a strict construction is adopted in determining the measure of power secured by a city charter, the rule being that a municipal corporation can exercise no powers except such as are expressly conferred, or are essential to the manifest objects and purposes of the corporation (*City of Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134; *Hubbard v. Town of Medford*, 20 Or. 315, 25 Pac. 640), it has been held that a power conferred by the legislative assembly upon a municipal corporation to borrow money carried with it, by implication, authority to issue to the lender, "as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper": *Brenham v. German Am. Bank*, 144 U. S. 173 (12 Sup. Ct. 559). Power to borrow money, in the absence of authority to give a mortgage as security therefor, necessarily carries with the grant the right to issue, as evidence of the loan, vouchers of indebtedness; and this right ought not to be defeated because the statute also confers authority to give a mortgage. The power of an agent to execute promissory notes for his principal will be strictly construed, the rule being that such authority is not conferred unless clearly given or necessarily implied (*Connell v. McLoughlin*, 28 Or. 230, 42 Pac. 218); notwithstanding which, it has been held that an agent's authority to execute a promissory note, so as to bind his principal, will be implied when the instrument was given for goods necessary to the transaction of the latter's business, which were used for his benefit, or purchased in pursuance of his authority: *Smith v. Gibson*, 6 Blackf. 639; *Odiorne v. Maxcy*, 13 Mass. 177. If it be assumed that the administrator was an agent, and the grant of power to borrow money is to be strictly construed, the right to issue a promissory note, as evidence of the loan, which was secured for the benefit of the estate in pursuance of law, is reasonably inferable from the power delegated. To the same effect, see *Wilson v. Troup*, 2 Cow. 195 (14 Am. Dec. 458).

By analogy, the power to borrow money conferred upon an executor or administrator by the statute evidently carries with it, by implication, authority to execute promissory notes evidencing the loan, expressing the rate of interest stipulated for, and fixing the day of payment, and also confers the right to execute an instrument in the form and containing the provisions in common use: Jones, Mort. § 129. It is the common practice, in this state, to include in a promissory note a stipulation for the payment of such sum as the court may adjudge reasonable for attorney's fees in case suit or action should be instituted to collect the sum specified in the note, or any part thereof; and, this being so, the administrator was authorized to include in the note in question such a promise.

5. It is argued that the act licensing an executor or administrator to borrow money, for the purpose of funding the indebtedness against a decedent's estate, limits the right to secure a loan to pay the claim of many creditors, and that the petition upon which the order was based, authorizing the borrowing of money, having disclosed that Caviness was the only creditor of the estate of M. Sterling, deceased, no authority existed for borrowing the money to pay his claims. In support of this principle, our attention has been called to the case of *Ketchum v. City of Buffalo*, 14 N. Y. 356, in which Mr. Justice SELDON, speaking for the court, says: "The term 'funding,' however, has been sometimes applied in this country to the process of collecting together a variety of outstanding debts against corporations, and borrowing money upon the bonds and stocks of the corporation to pay them off; the principal of such bonds and stocks being made payable at periods comparatively remote. But I am not aware that, even in common parlance, the term has ever been made use of to describe an ordinary debt, growing out of a transaction with one individual, and represented by a single instrument, as in this case. I think it is essential to the idea of a funded debt, even under the broadest use of that term, that the debt should be divided into parts or shares, represented by different instruments, so that such parts

or shares may be readily transferrable." In the case from which this excerpt is taken it was held, in construing an act of the legislature of New York prohibiting the contracting by a municipal corporation of a "funded debt" except in the mode pointed out, that the purchase of a site by a city for a market was not violative of such provision. Whatever the definition of "funding" may be when applied to the indebtedness of a municipal corporation, the explanation so given can have no application to the indebtedness against the estate of a decedent, for the word "funding," as used in the statute, was evidently designed to mean the borrowing of a sufficient sum of money to discharge the claims against an estate, by creating another debt in lieu thereof; and, while an estate may owe only one person a certain sum, it is just as much an indebtedness, and equally as susceptible of being funded, as though the claim were divided into a given number of parts, and held by several creditors. The conclusion thus announced must inevitably follow; for the object of the act was to prevent the sale of a decedent's property to satisfy demands against it, and, if money could not be borrowed to discharge the claims of a single creditor, the purpose of the act could be thwarted, and a sale of such property compelled by a person desiring to purchase it, who secured an assignment of all the claims against the estate. A statement of the consequences that might thus result shows the fallacy of the argument, and demonstrates that the county court was authorized to license the administrator to borrow money for the purpose of paying, or funding, his indebtedness against the estate.

6. It is contended that the State Land Board is a body of limited power having authority to loan the irreducible school fund of the state, taking mortgages as security therefor, and, while said board may institute a suit to foreclose a mortgage in case of a breach of its condition, or may accept a release of the equity of redemption (Laws, 1899, p. 156), no power is vested in said board to assign the notes and mortgages evidencing such loans. It is provided by the state constitution that the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university lands,

and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law: Const. Or. Art. VIII, § 5. And it is provided by statute that the governor, secretary of state, and state treasurer, as a board of commission for the sale of school and university lands and for the investment of the funds arising therefrom, shall be styled the "State Land Board," and such board shall have power, and is hereby authorized, to use a common seal, and the secretary of state shall procure such a seal for said board: Laws, 1899, p. 156, § 2. Whether the State Land Board is a corporation within the rule announced in *Dunn v. University of Oregon*, 9 Or. 357, or the officers composing such board are the agents of the state, which had an equitable interest in the note and mortgage in trust for the support of the common schools, it is unnecessary to consider, for in either case a corporation was charged with the duty of collecting the note, and, so long as a corporation violates no express restriction, it may take any usual or appropriate steps to realize on the securities taken by it: 7 Am. & Eng. Enc. Law (2 ed.), 802. It follows from these considerations that the decree is affirmed. **AFFIRMED.**

Argued 30 June; decided 14 July, 1902; rehearing denied.

HOUGH v. GRANTS PASS POWER CO.

[69 Pac. 655.]

PLEADING NEGLIGENCE OF MASTER.

1. A complaint stating that deceased, who was a lineman and repairer for an electric power company, was, by direction of the manager, working on certain dead wires that needed immediate attention; that it was the duty of the manager to avoid exposing deceased to any unnecessary danger, and to warn him of dangers that might result from a failure of the defendant company to perform its duty; that while deceased was so at work the manager neglected to give any notice at the power house to keep the power off until deceased should be safely out of the way, and failed to warn deceased of danger which was or should have been known to said manager; that in consequence of such neglect the electric current was turned onto the wires on which deceased was working, whereby deceased was killed, alleges the manager's knowledge of the danger, and justified proof that the manager did know the risk.

NEGLIGENCE OF MASTER—ALLEGING IGNORANCE OF DECEASED.

2. A specific allegation that deceased did not know of the danger was unnecessary, for deceased was working on dead wires, which presumably would not be made live wires without notice.

ELECTRIC LIGHT POLE AS DANGEROUS PLACE TO WORK.

3. A pole carrying electric light wires is not necessarily a dangerous place to work, with reference to the currents, that will depend upon the care exercised at the controller; and it need not be alleged that the workman did not know the place to be dangerous, for it was not so except by the employer's carelessness.

ALLEGING DUTY TO GIVE WARNING.

4. The complaint was not objectionable because failing to specifically state that it was customary to give notice at the power house that workmen were still employed on the line, it being apparent from the whole complaint that failure to give notice in the customary way was the negligence charged.

SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER.

5. Where a complaint in a personal injury action alleges negligence on more than one ground, it is good against a general demurrer if one of such grounds is sufficiently stated, though another is not.

DELEGATION OF DUTY BY MASTER.

6. Where a duty is imposed by law on a master with reference to his employes, it cannot be avoided by merely directing another employe to do it; of which rule this case affords an example: An electric lineman was working on dead electric light wires, under the immediate personal supervision of the light company's manager, just before time to start the dynamos in the evening. The manager directed another workman, having a bicycle, to ride past the power house and notify the employes there not to start the current till further notice. This employe negligently failed to reach the power house in time. *Held*, that the duty to give such notice was one personal to the master, and was not discharged by directing the workman to give it, unless he diligently performed his duty.

DUTY OF MASTER TO INFORM SERVANT OF SUDDEN DANGER.

7. It is the duty of a master to inform his servant of any sudden danger of which he has knowledge or should be informed, but of which the servant is ignorant, and the employe may rely on the warning and signals usually given in the conduct of the business, and, if the master fails to give these, he is negligent.

PLEADING AND PROOF—NEGLIGENCE.

8. Under a complaint alleging that plaintiff's injuries were caused by the negligent failure to notify defendant's servants at its power house not to turn on the current while plaintiff was working on the electric wires, evidence that it was customary to use a telephone to give such notification, instead of sending a messenger, as defendant did, was admissible; and the testimony as to such custom was not too remote in point of time, because relating to the year previous to the accident.

SHOWING COMPETENCY OF EXPERT BY CROSS-EXAMINATION.

9. Where the competency of an expert witness was not shown at the time he testified in chief, but was made fully apparent on cross-examination, admission of his testimony was not error.

EVIDENCE OF PREJUDICE OF THE JURY.

10. In a personal injury action against a corporation, the jury returned to the court room after the case was submitted to them, and stated that they understood that some time ago the "old company sold its interest to the new company," and they desired to know which of them would be responsible. The court stated that there was no evidence of any other company than the present defendant, and that the court knew of no other. The defendant was in fact what the jury referred to as the "new company," and was composed of nonresidents, while the former company was a local concern. *Held*, that the verdict could not be set aside on the ground that the personnel of defendant influenced the jury.

From Josephine: HIERO K. HANNA, Judge.

This is an action by A. C. Hough, as administrator of the estate of E. L. Moon, deceased, against the Grants Pass New Water, Light & Power Co., to recover for injuries received while acting in the capacity of a lineman in the employ of the defendant. The complaint, so far as it is of material import here, alleges "that the death of said Enoch L. Moon occurred and was caused by the neglect and wrongful acts and omissions of the defendant corporation, acting by and through its secretary and general manager, George I. Brown, in this: That the said Enoch L. Moon at the time of his death, on said October 2, 1899, and for some time prior thereto, was and had been an employe of said corporation, working on its electric system at Grants Pass, Oregon, as a lineman, and as such lineman it was his duty, under the instructions and directions of the said George I. Brown as general manager aforesaid, to ascend the electric light poles, and do all things needful for the keeping of the said line and electric light wires and apparatus in repair; and it thereby became the duty of said corporation, through its said secretary and general manager, to provide for said deceased safe and suitable appliances and places with and in which to work, and to avoid exposing said deceased to unnecessary danger, and to warn him of such dangers as to him were unknown, or to which any act or failure of duty of the said corporation should expose said deceased, and to this end to use and exercise due care, commensurate with the known danger, to protect said deceased from injury; that on said 2d day of October the said deceased, with the knowledge of said George I. Brown, acting

as manager aforesaid, and pursuant to his directions, and while under his control, was working on said line, doing necessary work on the electric light wires at or near the top of one of the electric light poles near the corner of Front and Fifth streets, which work was necessary to be completed before the said line was in condition for safe and proper use in lighting said town the night of said day; that on said date, while the deceased was performing said work and labor pursuant to the directions and by the authority aforesaid, the defendant, by its general manager aforesaid, wrongfully and negligently, and in violation of its duties and obligations to deceased, carelessly, negligently, and without due care on its part, by failing to take the ordinary, usual, and reasonable precautions, usual and customary in the conduct of its business, neglected and failed to give ordinary, usual, or timely notice to the defendant's employees at its power house that deceased was still working on the line aforesaid, and so prevent the electric current from being turned on said wires, and did carelessly and negligently fail to warn deceased of his danger, as was or should have been known to the said George I. Brown; and thereupon and in consequence of said negligence the dynamo or dynamos at the power house of said defendant were put in motion, whereby a powerful electric current was generated along and over said wires on which deceased was working, whereby and wherefrom said deceased received an electric shock, which caused him to be thrown from said pole a distance of about thirty feet, to the ground, and which caused his death; that defendant negligently failed and neglected to furnish and supply deceased with insulated nippers or rubber gloves with which to handle said wires in the course of his said employment; that the shock received by deceased and his subsequent death were caused by the wrongful acts, omissions, and negligence of the defendant corporation, through its manager, George I. Brown, neglecting to furnish deceased with insulated nippers and rubber gloves with which to handle said wires, and in not taking ordinary or reasonable care or means to prevent said electric current from being generated and turned upon said wires when deceased was working at said

time there as aforesaid, and in failing to warn deceased that there was likelihood or danger of said electric current being turned on, or that at said time and place it was unsafe to continue work, and in failing to take reasonable or ordinary precautions to notify defendant's employes at the power house that deceased was working on said wires, and so prevent said current from being turned thereon, and in failing to furnish deceased with rubber gloves and insulated nippers with which to handle said wires." A general demurrer to this complaint having been overruled, a trial was had, resulting in a judgment for plaintiff, and the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *William Torbert Muir* and *Austin S. Hammond*, with an oral argument by *Mr. Muir*.

For respondent there was a brief over the names of *A. C. Hough* and *H. D. Norton*, with an oral argument by *Mr. Hough*, *in pro. per.*

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The first question presented is whether the complaint states facts sufficient to constitute a cause of action, which must be considered in view of the verdict in favor of plaintiff. The specific objection urged is that it is nowhere alleged that Brown, the manager of the defendant company, knew of the danger to which the deceased was exposed, or that deceased was ignorant thereof, or even that there was any danger attending the specific work in which he was engaged. Among other things, it is alleged that it was the duty of Brown to avoid exposing the deceased to unnecessary danger, and to warn him of such dangers, or to which any act or failure of duty on the part of the defendant would expose him; that the deceased, with the knowledge of Brown, and pursuant to his direction, was working on said line, which work was necessary to be completed before the same was in a safe and proper condition to use in lighting the

town the night of said day, and while deceased was so at work the defendant neglected and failed to give the ordinary or timely notice to its employes at its power house that the deceased was still working on the line, and so prevent the electric current from being turned on, and did carelessly and negligently fail to warn the deceased of his danger, which was or should have been known to Brown, in consequence whereof the current was turned on, and the injury ensued. This condensed statement of the contents of the complaint almost answers the objection, without further comment. It is alleged that Brown did know or should have known of the danger attending this condition, which allegation is amply sufficient to charge him with such knowledge, and to let in proof to that purpose.

2. It was not necessary for plaintiff to allege that the deceased was without knowledge of his danger, because he was directed to work upon dead wires, and presumably they would not be rendered dangerous without due notice and warning to him.

3. The danger was one not incident to the place in which he assented to work, but resulted directly and immediately from the negligent act of the employer in permitting to be transmitted over the wires a deadly current of electricity, thus rendering the work that was before perfectly safe extremely perilous and hazardous to life. Speaking generally, the vocation of a lineman may be classed as hazardous, but in this instance neither the immediate work in hand, nor the place in which it was performed, was hazardous or dangerous, and it was the duty of the defendant to take proper and reasonable precautions to guard against converting his position of safety into one of peril. It was therefore unnecessary for the pleader to go further than to allege the duty, and the neglect thereof which directly conduced to the danger, and consequently to the injury of the deceased. It would be an idle ceremony to require plaintiff to allege that deceased was without knowledge that his position was perilous by reason of his employer's liability to turn on the electricity, which the duty of the latter required he should not do unless he gave notice or warning thereof: *Carlson v. Oregon S. L. Ry. Co.* 21 Or. 450, 454, 455 (28 Pac. 497); *Promer v.*

Milwaukee L. S. & W. Ry. Co. 90 Wis. 215 (63 N. W. 90, 48 Am. St. Rep. 905). He assumed no risk of that kind by assenting to do the work, whether it was with or without such knowledge. A person must so use his property as not to wantonly injure another, and a servant legally assumes no more danger or risk by working for a reckless employer than he does for a careful one. It is only when he enters a place of peril, obviously so, or knowing it to be such, that he assumes the risk incident thereto.

4. It is contended that the complaint is faulty because it contains no allegation that there existed any custom of the company to give notice at the power house that persons were still working on the line, or anything of equivalent nature. The complaint was evidently drafted with the purpose of establishing negligence by showing a failure to give such notice in the ordinary and usual way, thus implying that there existed a customary mode or manner by which it was transmitted to or imparted at the power house. It contains, also, a general allegation that the negligence consisted in not taking ordinary or reasonable care or means to prevent said electric current from being generated and turned on said wires when deceased was working among them, etc. It might have been better, as a technical pleading, to set out the customary manner of giving the notice and its nonobservance; but we are of the opinion that the complaint is sufficient when construed as a whole, especially after verdict.

5. There is another criticism relative to the allegation that defendant was negligent in failing to furnish deceased with insulated nippers or rubber gloves, because not coupled with an allegation showing the necessity of providing such appliances; but, as the complaint is found to be sufficient in the statement of negligence in one respect, it is good, as against a general demurrer, even if deficient in the statement of another instance of want of care.

6. A day or two before the injury occurred, a fire damaged the lighting system of the defendant to such an extent that it was necessary to repair it before further general use could be made of it. The power house where the electricity was generated

is situated about a mile distant from the office, but was connected therewith by a telephone. On the evening of October 2, 1899, the deceased ascended a pole for the purpose of tying four primary wires that had been drawn across the upper of the two cross arms attached to the pole, and thus completing the work of repairing the system and making it ready for use again. While so working he was heard to call out, and seen to be hanging for an instant by his legs and arms on the cross arms, and then to fall to the ground, a distance of thirty feet; and, when approached, life was extinct. W. L. Ireland testified that the deceased ascended a pole at the junction of Front and Fifth streets between fifteen and twenty minutes prior to six o'clock P. M., that two or three minutes later he ascended the pole from which he fell, and that he noticed that the electric lights were on immediately afterwards. Moorlock stated that the accident occurred "pretty near quitting time." George I. Brown, who was secretary and manager of the defendant company, testified that while the deceased was on the pole at the corner of Front and Fifth streets, and while standing within thirty-five or forty feet thereof, he directed Haskins, who was riding a bicycle, and was sixty-five feet or more distant from him, to go by the power house and tell Gentner, who was attending the dynamo, "not to turn the current on," and that this was close to an hour before the accident occurred; that witness subsequently went to the opera house, passing within fifty or sixty feet of the central office of the telephone company; that he had telephone connection with the power house, but that he thought the line was not in good working condition that evening. Haskins was in the employ of the defendant, and at the time was working on a dam, the location of which, with reference to the power house, does not appear. He needed some nails for his work, which Brown authorized him to obtain, and went to the Jewell Hardware Co.'s store for them. That he reached the store about half an hour before the accident; that he was there twelve or thirteen minutes, and then started away, and that about fifteen or twenty minutes afterwards the accident was reported at the store. Gentner testified that he was attending the dynamo, and

had charge of the power house; that he turned on the current four or five minutes before Haskins arrived; that Haskins told him of Brown's directions, and that he turned it off at once; that the time was a quarter of six or seven o'clock; and that the telephone was in good working order in the evening. It was further shown that the primary wires carried 2,200 volts, and that it required two or three minutes after the dynamo was set in motion to get a full current through them; also that it was customary, after telephone connection had been made with the power house, to notify the person in charge by that means when workmen were on the lines, and, if there was any rush work to be done before the lights could be turned on, it was the usual custom to notify the linemen, and if they were not notified they generally ceased work about six o'clock, or whenever it got too dark to see.

At the close of plaintiff's testimony a motion for a nonsuit was made and overruled, and, after all the testimony had been submitted, the court, among other things, gave the jury these instructions:

"If you find from the evidence that the deceased at the time was working on the electric light wires of the defendant with its knowledge or by its directions, and was killed by an electric current turned upon said wires by the defendant while he (deceased) was working upon them, and that the defendant, by using the ordinary and usual means of communication with its power house, viz., the telephone, could have prevented the electric current from being turned upon and over said wires at that time, but the defendant chose some other, less direct and more uncertain, mode of communicating with the power house, and that by reason thereof the said communication was not received at said power house until after the said current was turned on said wires on which the deceased was working, and that deceased received said current, and was killed by the shock therefrom, such finding would warrant you in further finding that the defendant was negligent. You may consider all these matters in determining whether or not the defendant was guilty of negligence at the time referred to.

"Where the negligence of the master is combined with the negligence of a fellow servant in producing the injury, which would not have happened but for the negligence of the master, and the person injured is himself free from negligence, the negligence of the fellow servant will not relieve the master from liability for the injuries so received.

"If a servant is charged with the performance of one of the master's duties, then the master must answer for his negligence in the discharge of that duty; and, if the servant whose negligence caused the injury was at the time performing one of the master's personal duties to his servants, the master is liable."

One reason urged why the nonsuit should have been granted is that plaintiff alleged that the defendant was negligent in not furnishing the deceased with rubber gloves or insulated nippers, and having failed to offer any proof to sustain the allegation, except that a pair of uninsulated nippers was found across one of the wires after the accident, he had not made a case sufficient to go to the jury. The manifest answer to this is that he was not required to rely upon this particular cause of negligence assigned, if he had another upon which he could depend for recovery. This matter was commingled in the complaint with other allegations of fact, which, if well founded, were sufficient without it to support the action.

The other question presented, both by the motion for a nonsuit and by the instructions, is one of more difficulty. Tersely stated, it is whether Brown discharged his duty to the deceased, as an employe of the company, by directing Haskins to go by the power house and notify Gentner not to turn on the electricity until further notified, and thereby relieved the company from liability for the injury sustained. The real situation is readily apparent. There was ample evidence from which the jury might have reasonably drawn the inference that Brown was exercising personal supervision of the work then being done. He was with the deceased shortly prior to the accident, supervising the work, and gave the directions to Haskins within his hearing. The duty which Brown attempted to perform by such directions was one personal to the master. It devolved upon him, under the

attending circumstances and conditions, to notify the operator at the dynamo not to turn on the electricity, and thus to protect the lives of the company's employees. The duty could have been discharged if he had taken reasonable precautions, such as would ordinarily be adopted by a prudent and reasonable person having experience in such matters; but it was not discharged by the mere selection of an agent, with directions to give the notice, whether the agent was a competent and careful person or not. He was still responsible for any dereliction of duty on the part of the agent, because he was directed to discharge a part of the master's duties, and therefore became vice principal, and in no sense a fellow servant with the injured party. This is not a case for the application of any general rule for the guidance, direction, and admonition of employees, but is one of special emergency. The lighting system of the defendant was, by reason of the damages sustained by fire, out of repair, and the deceased, with others, had been put to work by the general manager with a view to a quick and complete readjustment sufficient for use on the night of the accident, or at least such is the legitimate inference to be drawn from the testimony; and the general manager was looking personally to the protection of his men, and was discharging a personal duty, and he could not relieve the company of liability by delegating it to another, unless that other also exercised reasonable care and precaution in the discharge of such duty: *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Schroder v. Chicago & A. R. Co.*, 108 Mo. 322 (18 S. W. 1094, 18 L. R. A. 827); *Promer v. Milwaukee L. S. & W. Ry. Co.*, 90 Wis. 215 (63 N. W. 90, 48 Am. St. Rep. 905); *McCampbell v. Cunard S. S. Co.*, 69 Hun 131 (23 N. Y. Supp. 477); *Faulkner v. Mammoth Min. Co.*, (Utah) 66 Pac. 799; *Tedford v. Los Angeles Elec. Co.*, 134 Cal. 76 (66 Pac. 76, 54 L. R. A. 85); *Carleton Min. & Mill. Co. v. Ryan*, 68 Pac. 279.

This is the theory, no doubt, upon which the first and third instructions before stated were given, and there was ample evidence adduced upon which to submit the case to the jury in that light. There was a conflict in the testimony as to the time the direction was given Haskins with reference to the time of the

injury, and it was for the jury to say whether timely precaution had been taken to get notice to the tender at the dynamo by such means before he would ordinarily turn on the electricity. And again, it was for the jury to say whether Haskins, acting in the capacity of vice principal, used reasonable diligence and precaution in reaching the power house in time to impart the instruction. So, also, it was for them to say whether a reasonable and prudent person would not have made use of the telephone, under the exigencies then existing, rather than to have given the directions through Haskins. A further objection is made to the instructions because it is assumed thereby that the ordinary and usual means of communicating with the power house was by telephone. There is evidence in the case that the telephone was in good working order at that time. Indeed, Brown himself admits as much, but seeks to excuse his omission to use it by want of knowledge as to its condition; but it is not disputed that, when in working order, such was the ordinary and usual means of communicating with the power house. These instructions were therefore suitable to the facts adduced, and properly given. In other respects the evidence was ample to carry the case to the jury, and the nonsuit was properly overruled. The second instruction, although good law in the abstract, was not applicable to the case, but was harmless, as the defendant was responsible for the negligent acts of Haskins, at any rate.

7. There was another instruction given which is complained of, by which the jury were told, in effect, that it is the duty of the master to inform the servant of any sudden danger of which he has knowledge or should be informed, but of which the servant is ignorant, and that the employe might rely on the warning and signals usually given in the conduct of the business, and, if the master fails to give these, he is negligent. This was given apparently in view of the testimony that it was usual to notify the linemen when any rush work was to be done before the lights were turned on. This duty was also personal to the master, and he was charged with the exercise of reasonable foresight and precaution to see that intelligence of such danger was conveyed to the workmen, and an omission to give the usual

warnings and signals previously employed in the conduct of the business under like circumstances would be negligence on the part of the master. The giving of this instruction was not error.

8. There was an exception to the testimony of young Moon, showing that, in the year previous to the accident, Brown customarily used the telephone in notifying parties in charge of the power house when employes were at work upon the lines, or else he went in person. The objection is based upon the idea that no such custom was pleaded, and that the testimony was too remote in point of time to show that it was still customary at the time of the accident for Brown to notify the power house by telephone in such an emergency. The allegations of the complaint were broad enough to admit the evidence, as well as to support the verdict, and the time fixed by the witness when the custom was in vogue was not so remote as to destroy any tendency of the evidence to show that it continued to exist.

9. Another objection is also urged to the testimony of Dr. Moore in reply to some hypothetical questions put to him as an expert, upon the ground that he was not shown to be qualified to testify in that capacity. Without discussing the matter at large, suffice it to say that, if such qualification was not sufficiently shown when the questions were propounded, the cross-examination of the witness relieved the case of any complication on that account, as his competency to testify as an expert in the premises was fairly disclosed thereby, and the objection is therefore not well taken.

10. There was a motion to set aside the verdict and for a new trial, based upon the circumstance that the jury, after being instructed and having the case submitted to them, returned to the court room and inquired which would be responsible, the old or the new company, if they should find negligence, and were answered that the court knew of but one company,—the defendant's. The jury again inquired, saying: "You know that some time ago the old company sold its interest to the new company, and we desire to know who would be responsible,—the old or the new." The court again answered, saying: "There is no

evidence of any other than the present,—the defendant.” The jury thereupon again retired, and, after further deliberation, returned with their verdict. The appellant draws an inference from this circumstance that the jury found against the present company because its members were residents of Portland, and that if they had resided in Grants Pass the verdict would have been otherwise; and, based thereon, counsel insists that it should be set aside. What the jury’s motives were in making the inquiry does not further appear, but the court properly told them that there was but one defendant liable in the premises, namely, the one before the court, and the inference suggested is so remote and inconsequential that it could hardly be imputed to a jury acting under the sanction of an oath.

Having disposed of all the matters in controversy, and being favorable to respondent, the judgment is affirmed.

AFFIRMED.

Decided 14 July, 1902; rehearing denied.

GOODALE LUMBER CO. v. SHAW.

[69 Pac. 546.]

PART OF EVIDENCE BROUGHT UP—BILL OF EXCEPTIONS.

1. Where it affirmatively appears that the bill of exceptions contains all the testimony applicable to the decision of a point, and all that was considered by the trial judge in his ruling, it is sufficient to secure a consideration by the appellate court, though not all the testimony on other points is before the court: *Woods v. Courtney*, 16 Or. 121; *Roberts v. Parrish*, 17 Or. 583; *Coffin v. Hutchinson*, 22 Or. 554; and *Adkins v. Monmouth*, 41 Or. 266, distinguished.

PROOF OF CORPORATE EXISTENCE—COMPLIANCE WITH STATUTE.

2. A substantial compliance with all the requirements of the statutes is a necessary part of the creation of a corporation, and such compliance must be shown as part of the proof of corporate existence. In Oregon, for instance, under Sections 3217-3225 of Hill’s Ann. Laws, the testimony of a subscribing witness to a writing purporting to be articles of incorporation that he was present, and saw the persons named therein as incorporators execute it, the offering of the paper in evidence, and the testimony of one of the alleged incorporators that he is president of such corporation, unsupplemented by any evidence of the filing of the articles, the subscription of one-half of the stock, or the election of a board of directors, is insufficient to establish the existence of the corporation.

From Marion: GEORGE H. BURNETT, Judge.

This is an action by the Goodale Lumber Co. to recover on a promissory note. It is alleged in the complaint "that plaintiff is a corporation organized and existing by virtue of the laws of the State of Oregon, with its head office at Salem, Oregon"; that about April 3, 1895, the defendant, W. A. Shaw, and one Wm. H. Smith, Sr., executed to J. C. Goodale their promissory note for the sum of \$450, payable in three months, with interest at 10 per cent per annum; that Goodale assigned it to plaintiff, which is now the owner and holder thereof; that no part of said note has been paid, except the sum of \$49.60; and that, owing to the death of Smith, he is not made a party to the action. The answer denies the material allegations of the complaint, except the execution of the note, and sets out two separate defenses, a statement of which is not necessary to a decision herein. At the trial a subscribing witness testified that he was present, and saw a document purporting to be plaintiff's articles of incorporation executed by persons therein named as incorporators, and to which he appended his name as a witness, whereupon said articles were received in evidence, over defendant's objection and exception. The bill of exceptions, referring to the testimony so introduced, contains the following recital: "There was no other evidence of the incorporation or organization of the plaintiff as a corporation offered or received upon said trial tending to prove that the said articles of incorporation had been filed in the office of the County Clerk of Marion County, Oregon, or in the office of the Secretary of State for the State of Oregon, or filed elsewhere, or at all; and there was no evidence offered or received upon said trial tending to show that any of the capital stock of the plaintiff corporation had been subscribed, or that it had been organized by electing officers, except that one J. C. Goodale testified orally that he was president of the plaintiff corporation." The plaintiff having introduced its testimony and rested, the defendant filed a motion for a judgment of nonsuit, which having been overruled an exception was allowed. Upon the cause being submitted, the court charged the jury, in effect, that said articles were sufficient evidence of plaintiff's existence

as a corporation, to which an exception was reserved. The jury returned a verdict for the sum demanded, and, judgment having been rendered thereon, the defendant appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Peter H. D'Arcy* and *Mr. John A. Carson*.

For respondent there was a brief over the name of *Brown & Wrightman*, with an oral argument by *Mr. J. N. Brown*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by defendant's counsel that, no proof having been offered tending to show that plaintiff's articles of incorporation had been filed, or any of its capital stock taken, or directors elected, the court erred in refusing to grant the nonsuit. It is maintained by plaintiff's counsel, however, that, as the bill of exceptions does not purport to contain all the testimony given at the trial, the action of the court in overruling the motion for nonsuit is not subject to review. "It has been repeatedly held," says Mr. Chief Justice BEAN in *Adkins v. Monmouth*, 41 Or. 266 (68 Pac. 737) "that the rulings of the circuit court on a motion for nonsuit for insufficiency of testimony will not be reviewed upon appeal, unless the bill of exceptions affirmatively shows that it contains all the evidence given up to the time the motion was made." To the same effect, see *Woods v. Courtney*, 16 Or. 121 (17 Pac. 745); *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Coffin v. Hutchinson*, 22 Or. 554 (30 Pac. 424). In these cases, while testimony was found in each transcript tending to prove a material fact, the bill of exceptions did not contain a statement that no other relevant testimony had been offered, and, as error will not be presumed, but must affirmatively appear in order to secure a reversal, it was properly held that, the bill of exceptions not containing all the testimony introduced at the trial up to the time the motion for a judgment of nonsuit was made, the ruling of the court thereon would not be reviewed

upon appeal. The law, however, does not require the performance of vain things; and where, as in the present instance, the testimony set out in the bill of exceptions clearly shows the mode adopted to prove a particular fact, and also contains a statement which necessarily negatives the possibility of other testimony having been introduced upon the issue involved, the reason for the rule announced in the cases adverted to ceases, and the rule, which is otherwise general, has ingrafted thereon and becomes subject to an exception, which is illustrated in cases like the one at bar, where the bill states the objection with so much, but no more, of the evidence than is necessary to explain it: Hill's Ann. Laws, § 232. When the bill of exceptions affirmatively shows that it contains all the testimony possibly applicable to, and considered by the trial court in ruling upon, a motion for a judgment of nonsuit, the appeal necessarily brings up for review the action of the court in disposing of the motion.

2. Considering the case on its merits, a private corporation is created by three or more persons subscribing their names to and acknowledging written articles of incorporation in triplicate, one of which shall be filed in the office of the secretary of state, one with the county clerk of the county where the business is proposed to be located, and the other retained in the possession of the corporation: Hill's Ann. Laws, §§ 3217, 3218. The articles of incorporation or a certified copy of the one filed with the secretary of state or the county clerk is evidence of the existence of such corporation: Hill's Ann. Laws, § 3219. Upon making and filing articles of incorporation, the persons subscribing their names as incorporators are authorized to carry into effect the objects specified in the articles: Hill's Ann. Laws, § 3221. The incorporators are authorized to open books and receive subscriptions to the capital stock of the corporation, and, when one-half of such stock has been subscribed, it shall be lawful in the organization of the corporation to elect a board of directors: Hill's Ann. Laws, § 3222. The directors, when elected and qualified, shall elect one of their number president: Hill's Ann. Laws, § 3225. As the making of articles of incorporation necessarily precedes their filing, it is the latter act that

gives vitality to and brings into life a private corporation, and such filing is a condition precedent to its existence: Hill's Ann. Laws, § 3221; *Coyote G. & S. Min. Co. v. Ruble*, 8 Or. 284. Morawetz, in his work on Private Corporations (2 ed. § 27), in discussing this subject, says: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate or articles of association setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed the association will have no right whatever to assume corporate franchises." This author, in speaking of the proof of the performance of conditions precedent (Section 41), further says: "In order to prove the legal existence of a corporation, it is necessary to show that every condition precedent, subject to which the franchise of forming the corporation is conferred, has been complied with. Thus, it is essential, in order to establish the incorporation of a company under a general law, to show that all formalities prescribed by the law have been followed."

While the statute provides that the articles of incorporation, or a certified copy of the one filed with the secretary of state or county clerk, is evidence of the existence of such corporation (Hill's Ann. Laws, § 3219), this clause must necessarily be construed *in pari materia* with another section, which provides that upon filing articles of incorporation the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles: Hill's Ann. Laws, § 3221. In the methodical order of offering the necessary evidence it would seem proper to prove the execution and acknowledgment of the articles of incorporation in triplicate, and that one of such articles had been filed in the office of the secretary of state and another in the office of the clerk of the county where the business of the corporation is proposed to be conducted: Hill's Ann. Laws, § 3218. If Section 3219 is to be construed literally, and the existence of a *de jure* corporation can be established by the intro-

duction in evidence of the articles of incorporation, without other proof except that of a subscribing witness (Hill's Ann. Laws, § 761), it is possible, in the absence of filing the articles, to prove the existence of a corporation that has no vitality, the absurdity of which demonstrates that evidence other than the articles of incorporation is necessary. If, instead of the articles of incorporation retained in plaintiff's possession, a certified copy had been introduced in evidence, it would have disclosed that at least one of the original articles had been filed with the certifying officer, and such proof would have come nearer establishing the existence of the corporation than the mode adopted. The articles of incorporation, unsupplemented by other proof, were, in our judgment, inadequate to prove the existence of the plaintiff as a corporation, and hence the court erred in charging the jury that the document introduced in evidence was sufficient for that purpose. A corporation is created by making and filing articles of incorporation (Hill's Ann. Laws, § 3221), and is organized by electing a board of directors, which can only be done when one half of the capital stock has been subscribed: Hill's Ann. Laws, § 3222; *Fairview R. Co. v. Spillman*, 23 Or. 587 (32 Pac. 688). Thus, as was said by Mr. Chief Justice KELLY, in *Holladay v. Elliott*, 8 Or. 84: "Where the statute prescribes the manner in which a corporation shall be organized, its requirements must be substantially complied with; otherwise it will have no legal capacity to transact business as a corporation." Mr. Justice WOIVERTON, in *Nickum v. Burckhardt*, 30 Or. 464 (47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822), discussing this subject, says: "The organization is completed only when the directors have been elected, and they have elected a president and secretary." The complaint having alleged that plaintiff is a corporation organized and existing by virtue of the laws of the State of Oregon, and this averment being denied in the answer, the burden was imposed upon it to prove the fact thus in issue. The neglect to show that one half of the capital stock had been taken, or a board of directors elected, was a failure to prove that plaintiff had ever been organized as a *de jure* corporation; and as it could transact no business in that capacity until thus constituted (*Hol-*

lady v. Elliott, 8 Or. 84), there was an omission to prove a material averment of the complaint.

The testimony introduced was insufficient to establish plaintiff's organization as a corporation, and the court erred in refusing to grant the judgment of nonsuit, in consequence of which, and of the giving of the instruction complained of, the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 8 July; decided 21 July, 1902.

ABRAHAM v. OREGON & CAL. RAILROAD CO.

[69 Pac. 653.]

RAILROADS—GRANT FOR LEGITIMATE RAILROAD PURPOSES.

1. Land used for a railroad hotel and eating house may be for "legitimate railroad and depot purposes"; whether it is or not will depend upon a variety of conditions and circumstances, important among which is the good faith of the railroad company in so using the property as an incident to the operation of the road, and where such use is in good faith the courts will hesitate about disturbing it.

IDEM—FACTS IN EVIDENCE.

2. The station where the land was situated was a small one, at which a large force of men necessarily made their headquarters, and where freight and delayed passenger trains were accustomed to stop for meals, though no passenger trains stopped regularly for such purpose. There was no other station where employes or passengers could be accommodated with meals nearer than 35 miles. *Held*, that the construction of the hotel and eating house on the land was a use of it for a legitimate railroad purpose.

IDEM—ACCOMMODATIONS TO THE PUBLIC.

3. Where land is granted to a railroad company "for all legitimate railroad and depot purposes," and a hotel and eating house is erected on the land as an incident to the operation of the road, the fact that accommodations are granted the general public apart from strictly railroad business does not render the use of the land repugnant to the grant; nor is the question affected by the fact that there is a public hotel near by ample to accommodate the passengers and railroad employes.

From Douglas: JAMES W. HAMILTON, Judge.

Suit by Morris Abraham as administrator of the estate of Sol Abraham, deceased, substituted for Sol Abraham, against the

Oregon & California Railroad Company and others. From a judgment dismissing his complaint, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Albert Abraham*, with an oral argument by *Mr. Abraham* and *Mr. J. C. Fullerton*.

For respondents there was a brief over the names of *Wm. D. Fenton*, *Wm. T. Muir*, *Willis & Rice*, and *R. A. Leiter*, with an oral argument by *Mr. Fenton* and *Mr. Leiter*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to enjoin the defendants from operating or permitting to be operated, a hotel or eating house on land conveyed to the defendant Oregon & California Railroad Co., by the plaintiff and his grantors, "for all legitimate railroad, depot, and warehouse purposes," on the ground that it is maintained and operated for the accommodation of the general public, and is not necessary or convenient for the operation of defendants' railway. The complaint was held sufficient on demurrer (*Abraham v. Oregon & C. R. Co.*, 37 Or. 495, 60 Pac. 899, 12 Am. & Eng. R. R. Cas. N. S., 250, 82 Am. St. Rep. 779), and, upon the cause being remanded to the court below, the defendants answered. They deny that the hotel or eating house complained of is not necessary or convenient for the operation of the railway, and affirmatively allege that the defendant the Southern Pacific Company, finding that the establishment of an eating station was necessary in order to carry out and facilitate the operation of its railway, and to enable its employes and passengers to be fed, housed, and entertained, leased a portion of said premises on August 1, 1897, to the defendant Clarke, in consideration of which she covenanted and agreed to erect and maintain thereon, at her own expense, a good and substantial building "for eating house and hotel purposes," for the use and accommodation of its passengers and employes; that thereafter, in pursuance of such lease, Mrs. Clarke did construct, according to plans approved by the Southern Pa-

cific Company, a good and substantial building, which she opened on the 25th of November, 1897, to the traveling public and the passengers and employes of the railway company, and has ever since maintained and operated it as an eating house or hotel, and that during all of such time its maintenance was, and is now, necessary and convenient for the use and operation of the railway. A demurrer to the answer was overruled, and a reply filed, putting in issue the material allegations thereof. Upon the trial the court found from the evidence that it was and is necessary for the railway company to have and maintain at Glendale an eating station for the accommodation of its passengers and employes; that the hotel operated by the defendant Clarke was constructed and has been maintained at the company's instance and request, for that purpose, and that it is not violative of any covenant in the deed of conveyance from plaintiff to the defendant the Oregon & California Railroad Co., although it has been and is kept open to the general public. The complaint was thereupon dismissed, and the plaintiff appeals.

1. The law of this case was settled on the former appeal. It was there said: "Where hotels or eating houses appear to be reasonably necessary for the convenience of its employes and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered. As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed question of law and fact, to be determined from the circumstances of each particular case": *Abraham v. Oregon & C. R. Co.*, 37 Or. 495 (60 Pac. 899, 82 Am. St. Rep. 779, 12 Am. & Eng. R. R. Cas. N. S., 250.) Within this doctrine, the maintenance of an eating house or hotel is a legitimate railroad purpose when the convenience of the employes and passengers of the company is subserved by it, but a hotel maintained for the general public alone is not: *State v. Baltimore & O. R. Co.*, 48 Md. 49. Yet, if an eating house or hotel is reasonably convenient and appropriate to the operation and maintenance of the road, it may be built or operated by the railroad company, al-

though depending for part of its patronage upon the general public. Much evidence was given in this case, tending to show the amount of patronage the hotel derived from the general public as distinguished from that of passengers and employes of the company; the witnesses being hopelessly in conflict upon the subject. But we do not understand that the character of its use is to be determined by segregating strictly railroad business from that done with the general public, and deciding as either may happen to preponderate. Nor is the question of the advisability of maintaining such a place for the convenience of passengers and employes affected alone by the number of people availing themselves of the privilege offered, or even by the number of trains scheduled to stop for meals. The locality, the nature of the physical surroundings, the traffic and business of the road, and many other circumstances, should be considered; and, after all, it must ultimately depend to a large extent upon whether the business is carried on in good faith, as an incident to the operation of the road, or is entirely disassociated from it. The courts cannot undertake to draw any nice distinction, or apply any arbitrary test, to determine the necessity of establishing or maintaining such places of entertainment by railway companies, and, so long as it appears that they are not wholly foreign to the business of the corporation, the courts will not interfere with them. In the very nature of things, much must necessarily depend upon the judgment and discretion of the officers and managers of the company. They establish and maintain eating stations with reference to fixed or probable schedules and operation of trains, peculiarities of varying locations, or other general needs and exigencies of the business, all of which are within their cognizance and knowledge; and their judgment should prevail so long as they do not divert the property to uses wholly foreign to its organization or the terms of the grant conveying it: *Proprietors, etc., v. Nashua & L. R. Co.*, 104 Mass. 1, 9 (6 Am. Rep. 181); *Pierce v. Boston & L. R. Co.*, 141 Mass. 481 (6 N. E. 96); *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582, 589.

2. Apply these principles to the case in hand, and there can be but one result. Glendale is a small station at the head of

Cow Creek Canyon. It is at the foot of a very difficult grade, where the company is obliged to keep helper engines stationed to assist heavy trains over the mountains. From Glendale to the mouth of the canyon is about thirty miles, along which the road runs through a narrow defile, making it expensive and difficult to maintain. It is necessary for the company to keep a large force of men constantly employed in the canyon for the purpose of patrolling and keeping the road in repair, who must necessarily make their headquarters at Glendale. In addition to this, freight and delayed passenger trains are accustomed to stop at the station for meals, and, although passenger trains have not stopped regularly for such purpose since the construction of the hotel in question, the evidence shows that, during a considerable portion of the time since the road was built, Glendale has been a regular eating station for passengers on the company's trains, and may become so again at any time. There is no other station where employes or passengers of the company can be accommodated with meals between Riddles, some thirty-five miles north, and Grants Pass, about the same distance south. The managers of the road testify that it is very desirable to have an eating house or hotel, under the supervision and control of the company, at Glendale, on account of the peculiar location of the town, and the necessity of providing board and lodging for the crews of the helper engines and freight trains, the men employed in patrolling and keeping the road in repair, and passengers traveling on its trains. It was for this purpose the hotel in question was built, according to plans submitted to and approved by the manager of the company, with a dining room large enough to accommodate one hundred persons, but with only eight or ten sleeping rooms.

3. It is argued, however, that there is no necessity for the defendants maintaining or operating an eating house or hotel, because the plaintiff is conducting one near the depot grounds, which is amply sufficient for the accommodation of the passengers and employes of the railway company. But the fact that some other person has provided accommodations which may be used if desired does not determine whether the defendants' eating house is or is not a legitimate railroad purpose. The testimony

shows many reasons why it is desirable that eating houses and hotels at such stations as Glendale should be under the supervision and subject to the inspection of the managers of the railway company. Aside from this, however, if the hotel or eating house is reasonably convenient and appropriate to the maintenance and operation of the road, it does not matter that it may come in competition with other places of like character, nor that it may furnish accommodations for persons not connected with the road; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. The testimony further shows, and it is undisputed, that it is desirable and customary for railroad eating houses to have more or less outside business, as it helps pay expenses, and enables the proprietors to serve better meals and furnish better accommodations for the passengers and employes of the company. Such is the custom at other eating stations on the railroad, and there is no reason why it should not be followed in this instance. Our conclusion from the evidence is that the hotel or eating house maintained by the defendants, or under their supervision, is convenient and proper as an incident to the management and operation of the railroad, and is therefore a legitimate railroad purpose within the meaning of the deed from the plaintiff to the defendants. The decree of the court below will therefore be affirmed.

AFFIRMED.

Argued 2 July; decided 21 July, 1902.

• NOBLITT v. DUBBIN.

[69 Pac. 685.]

STATEMENTS OF POSSESSOR OF CHATTEL AS EVIDENCE OF OWNERSHIP.

1. Where the subject of inquiry is the right of one in possession of chattels, his statements concerning his possession are competent as part of the *res gestae*, provided they explain or illustrate the character of his holding.

NARRATIVES OF PAST EVENTS—EVIDENCE AS TO THIRD PERSONS.

2. A statement by a person at the time of an act and explanatory thereof is often competent evidence, but not a statement made afterwards, when the rights of other persons are involved.

REGISTRY OF CHATTEL OWNERSHIP BY MARRIED WOMAN.

3. Hill's Ann. Laws, § 3000, providing that personal property not registered by a married woman shall be deemed *prima facie* to be the property of the husband, does not apply to property purchased by her after marriage, or acquired by gift from her husband.

From Marion: GEORGE H. BURNETT, Judge.

This action was commenced October 22, 1900, by Mrs. R. L. Noblitt and C. F. Ziegler to recover from F. W. Durbin possession of certain personal property, consisting of horses, carriages, etc., used in a livery stable business. The plaintiffs, Mrs. Noblitt and Ziegler, allege that on July 13, 1900, they were and now are partners doing a general livery business at Hubbard, in Marion County, and as such were and are the owners and entitled to the possession of the property in controversy; that on the day named the defendant wrongfully, unlawfully, and without their consent took possession thereof, and has ever since retained the same. The defendant for answer denies that Mrs. Noblitt is a partner with Ziegler in the livery business, but alleges that her husband, W. Noblitt, is the real party in interest; that on July 19, 1900, he, as sheriff, attached Noblitt's interest in the property, to wit, an undivided one half thereof, by taking the whole into his possession, under a writ of attachment in an action brought against Noblitt, and retained the same until taken from him in this action. There is no controversy as to the regularity of the attachment proceedings, nor as to Ziegler's ownership of an undivided half of the property. The single question in dispute is whether the title to the other half belongs to the plaintiff Mrs. Noblitt or to her husband, the defendant in the writ of attachment. After the plaintiffs had given evidence at the trial tending to sustain the allegations of their complaint, the defendant called as a witness one W. H. Bair, who testified that in the fall of 1900 W. Noblitt was in possession of the business; that, upon witness hiring a team of him, he agreed that the amount charged therefor should be credited upon an indebtedness he owed the witness, and also promised that after the busy season was over he would apply a part of the property in controversy on such indebtedness. This testimony was stricken out by the court, on motion, because Nob-

litt's declarations were not made in the presence of his wife, and were therefore not binding on her. The defendant also called as a witness one G. W. Fisher, who testified that he was present when a bill of sale conveying an undivided one half of the property in controversy was executed by one Fryrear to Mrs. Noblitt; that she was not present at the time, but her husband paid the consideration, and transacted the business for her. The witness further said, in response to a question of defendant's counsel, that Mr. Noblitt told him he had a reason for having the bill of sale made in favor of his wife. Upon cross-examination, however, it was disclosed that Noblitt's statement on this subject was made a day or two after the bill of sale had been executed and delivered; whereupon the court struck out the testimony. At the conclusion of the evidence the defendant requested the court to charge the jury: (1) That, if Mrs. Noblitt had not made and filed a list of her personal property with the county clerk, her husband would be presumed to be the owner thereof, which presumption could only be overcome by affirmative evidence that she, and not her husband, owned the property; and (2) that if W. Noblitt was in charge of the livery stable with Ziegler, exercising acts of ownership over the property, he is to be considered the owner, unless Mrs. Noblitt shows by clear and satisfactory evidence that it belonged to her. The court refused to give the instructions as requested, and plaintiffs recovered judgment, from which the defendant appeals, assigning such refusal and the exclusion of the testimony as error.

AFFIRMED.

For appellant there was a brief over the name of *Carson & Adams*, with an oral argument by *Mr. Loring K. Adams*.

For respondents there was a brief over the names of *Wm. M. Kaiser, Woodson T. Slater* and *Tilmon Ford*, with an oral argument by *Mr. Kaiser*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. There was no error in striking out the testimony of the witness Bair, to the effect that he hired a team of Noblitt, and that the latter agreed that its hire should be credited on his individual debt, and he would subsequently turn over to Bair as a further credit thereon a part of the property in controversy. Where the nature of one's possession is a subject-matter of inquiry, his declarations concerning the title or explaining the character of his possession are admissible in evidence as part of the *res gestae* (*Bartel v. Lope*, 6 Or. 321; 1 Greenl. Ev. [15 ed.], § 109; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, 70, note; *Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 402, 68 Am. St. Rep. 550); but this rule does not extend to the admission in evidence, as against third persons, of all statements made by a party in possession of property. To be admissible, they must be such as reflect light on or qualify the possession itself, or be so connected therewith as to illustrate its character. Thus, in *Martin v. Hardesty*, 27 Ala. 458 (62 Am. Dec. 773), a witness was permitted to testify that a person, while in possession of a slave alleged to be stolen, said that the slave belonged to him, and that he had given another person a power of attorney, and employed him to sell her. It was held that it was proper to prove what the person in possession of the slave said as to the ownership, as that was explanatory of the possession, but that his statement in regard to authorizing another to sell the slave was incompetent because it related to a past transaction, and did not constitute a part of the *res gestae*. And so, in this case, the declarations of Mr. Noblitt sought to be proved by Bair did not concern the ownership of the property in controversy, nor were they explanatory of the character of his possession. It was not an assertion of ownership on his part, nor any explanation of his possession, to agree that "the hire of such team should be credited upon his indebtedness to the witness," or that "after the rush of the season was over, he would turn over to the witness Bair a team." There was no evidence that any credit was ever given by,

or team turned over to, Bair. The statements were not in conflict with Mrs. Noblitt's ownership of or interest in the property; nor were they a claim of ownership by her husband, or any explanation of his possession; hence they were clearly incompetent.

2. The same principle disposes of the declarations of the witness Fisher. Where evidence of an act done by a party is admissible, his declarations made at the same time and in explanation thereof are also admissible, as part of the *res gestae*: 1 Rice, Ev. 384; 1 Greenl. Ev. (15 ed.), § 110. But this rule does not extend to a mere narrative of a past occurrence. The alleged statement to Fisher was made some time after the execution and delivery of the bill of sale, and did not accompany the act, but was a mere narrative of a past event, and hearsay.

3. There was no evidence as to whether Mrs. Noblitt had made and filed a list of the personal property in question, and for that reason it was not error to refuse to give the instruction as to the effect of her failure to do so. Moreover, the statute would seem to provide for the filing of such a list only when the property claimed was owned by the wife at the time of her marriage, or afterwards acquired by bequest, inheritance, or gift of some person other than her husband: Hill's Ann. Laws, § 3000. The property in controversy here was acquired by Mrs. Noblitt, if at all, by purchase, and hence does not come within the language of the statute. The other instruction requested and refused was covered by the general charge. The judgment is therefore affirmed.

AFFIRMED.

Argued 19 July; decided 28 July, 1902.

NELSON v. YAMHILL COUNTY.

[60 Pac. 678.]

HIGHWAY PETITION—DESCRIPTION OF TERMINUS.

1. Under Section 4062 of Hill's Ann. Laws, requiring a petition for the location of a county road "to specify the place of beginning, the intermediate points, if any, and the place of termination," such a document is sufficient if from its terms these points can be definitely ascertained; thus, a petition is sufficient when the terminus can be definitely ascertained by following the description from the initial point—and particularly when it can be further fixed by pursuing the last two calls from a given point. It is not necessary that the petition describe each or any point with such exactness or detail that it can be found without referring to any other part of the petition.

From Yamhill: REUBEN P. BOISE, Judge.

Proceeding by Yamhill County to establish a county road. Judgment for the county, and Amos Nelson brings a writ of review.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. E. Magers* and *Mr. W. T. Vinton*.

For respondent there was a brief and an oral argument by *Mr. John J. Spencer*.

MR. JUSTICE BEAN delivered the opinion.

This is a proceeding, by writ of review, to annul and set aside the action of a county court in locating and establishing a county road. The only question for decision is whether the terminus thereof is sufficiently specified in the petition for its location. The road, as set out in the petition, begins at a certain definite point with reference to a previously located county road and the government survey; runs thence by course and distance to angle 1; thence in the same way to angle 2, and so on, for about two miles, to angle 29, "at southeast corner of C. E. Baker's land"; from thence it runs according to courses and distances about three quarters of a mile to angle 34, "at a point 20 feet west of the southeast corner of Amos Nelson's land claim; thence north,

on a line 20 feet west of said Nelson's east line, 39.19 chains, to angle 35 in said Nelson's field; thence north, 55 degrees 40 minutes west, 15.74 chains, to a stake, for terminus of proposed county road,—said stake being set in the center of a certain county road now there,—and from which point an oak 12 inches in diameter bears south, $79\frac{1}{2}$ degrees west, 85 links distant, and an oak 10 inches in diameter bears north, $62\frac{1}{2}$ degrees west, 185 links distant." The contention is that, although the terminus of the proposed road can be definitely ascertained from the courses and distances as given in the petition, it is insufficient because it is not certain and definite of itself, and without reference to other calls in the description. It is argued that the law contemplates and requires that a petition for the location of a county road shall specify the place of beginning, the intermediate points, if any, and the terminus of the road, so that each can be ascertained and determined by any person whose interests might be affected from an inspection of the petition, without reference to any other part of the description. But we do not so interpret the statute. It requires a petition for laying out, altering, or locating a county road to "specify the place of beginning, the intermediate points, if any, and the place of termination of said road": Hill's Ann. Laws, § 4062. And this requirement is complied with when these points are so designated "that a person of ordinary intelligence need not mistake their location": *Woodruff v. Douglas County*, 17 Or. 314 (21 Pac. 49). The statute does not require the route of the proposed road to be stated with technical accuracy. It is sufficient if the petition conveys to those interested information of the beginning, intermediate, and terminal points, and its general course. When, from the description as given in the petition, these points can be definitely ascertained, it is all the law requires: 2 Lewis, Em. Dom. (2 ed.), § 350; *Ames v. Union County*, 17 Or. 600 (22 Pac. 118). Now, in the case at hand there can be no difficulty in ascertaining the terminus of the proposed road from the description contained in the petition. By commencing at the initial point and following the calls, the route can be accurately traced, as it seems to have been

carefully surveyed before the petition was filed. But if it is not allowable to use the initial point as a call in ascertaining the terminus, under the doctrine that that is certain which can be made so, as held in some of the authorities (*Miller v. Porter*, 71 Ind. 521), the latter point can be ascertained and located by interested parties, and without imposing any unreasonable burden upon them, from the call at angle 34, 20 feet west of the southeast corner of Nelson's land claim; and that is all the law requires. The judgment of the court below is therefore affirmed.

AFFIRMED.

Decided 28 July, 1902.

SALEM TRACTION CO. v. ANSON.

[67 Pac. 1015, 69 Pac. 675.]

DISMISSING APPEAL—DEFECTIVE NOTICE.

1. A notice of appeal, reciting the judgment as rendered June 18, whereas it was actually rendered June 8, was not ground for dismissing the appeal, where it was manifest from the appeal papers that there was a mere clerical error, and no injury.

RIGHT OF REFERENCE.

2. Hill's Ann. Laws, § 222, subd. 1, providing that the court may upon the application of either party, or upon its own motion, direct a reference, "when a trial of an issue of fact shall require the examination of a long account on either side," is not an infringement of the right of trial by jury, and is applicable to actions in either tort or contract.

WHAT ARE LONG ACCOUNTS—DISCRETION OF TRIAL COURT.

3. Where it fairly appears by affidavit, or upon the face of the pleadings, that so many separate and distinct items will be litigated or examined that a jury cannot keep the evidence in mind in regard to each item, the case may be referred, whether the parties consent or object; and the action of the trial court in the matter will not ordinarily be disturbed.

CONVERSION BY AGENT—TROVER.

4. Where an agent's contract of employment requires him to turn over to his principal the identical moneys collected in the course of his employment, trover may be maintained by the principal against him for the conversion of moneys collected.

TROVER—DESCRIPTION OF MONEY CONVERTED.

5. In actions of trover for the conversion of money collected by an agent the complaint need not particularly describe the money, but it will be sufficient to state the aggregate amount taken.

EXPERT EVIDENCE OF THE CONTENTS OF BOOKS—SUMMARY.

6. Under Hill's Ann. Laws, § 691, subd. 5, permitting oral evidence of the contents of a writing where the original consists of numerous accounts, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, it is competent to show by an expert accountant the condition of books kept by or under the direction of the defendant, who is charged with conversion of his principal's money, and the tabulated results of his examinations.

OBJECTION NOT MADE BEFORE THE TRIAL COURT.

7. Where an expert testified as to the contents of plaintiff's books, that the books themselves were not offered is no ground for complaint on appeal; the record indicating that they were in court, and the failure to offer them not having been made a ground of objection to the expert's testimony.

WEIGHT OF EVIDENCE—QUESTION FOR JURY.

8. On appeal the court can only examine the testimony for the purpose of ascertaining whether there was any competent evidence tending to support the conclusions of the trial judge.

TROVER—SUFFICIENCY OF EVIDENCE.

9. In trover for the conversion of moneys collected by defendant as plaintiff's agent, the evidence showed that the books of account were kept under the direction of the defendant; that they indicated that certain moneys due the plaintiff were collected from the state and from a county, and not accounted for by him; and that two false entries had been made therein by the defendant's direction, crediting one account with large sums and charging the same to stores, when in fact no stores had been purchased. The defendant gave no evidence on the trial whatever, and did not undertake to explain any of these circumstances, or account for the false entries in the books. *Held*, that the evidence sustained a verdict for plaintiff.

From Marion: GEORGE H. BURNETT, Judge.

Action of trover by the Salem Light & Traction Co. against F. R. Anson, wherein plaintiff had judgment. A motion to dismiss the appeal was overruled, and the case heard on its merits.

MOTION OVERRULED: AFFIRMED.

Decided 10 March, 1902.

ON MOTION TO DISMISS THE APPEAL.

Mr. William M. Ramsey, for the motion.

Mr. Woodson T. Slater, *contra*.

PER CURIAM. 1. It is stated in the notice of appeal that the judgment appealed from was rendered on the 18th day of June, 1901, whereas it was actually rendered on the 8th of that month,

and it is so stated in the undertaking on appeal. The judgment is otherwise properly described in the notice. The contention is that the appeal should be dismissed because of the mistake in the date, but we think it manifest from the transcript, the undertaking on appeal, and the notice itself that it was merely a clerical error, which in no way could have injured or misled the respondent; and under *Moorhouse v. Donica*, 13 Or. 435 (11 Pac. 71) and *Lancaster v. McDonald*, 14 Or. 264 (12 Pac. 374) the motion should be overruled; and it is so ordered.

MOTION OVERRULED.

Decided 28 July, 1902.

ON THE MERITS.

This is an action in trover for money alleged to have been collected by the defendant for the plaintiff and converted to his own use. The complaint alleges that the plaintiff is a corporation engaged in the conduct and operation of street railways and an electric light and power plant in the City of Salem; that from June 1, 1898, to October 20, 1899, the defendant was the managing agent of the plaintiff, and as such had the care and control of its properties, the collection of amounts due it, and the supervision of the keeping of its books of account; that between the dates named he received and collected for and on account of the plaintiff large sums of money due it for light furnished and other services rendered to the State of Oregon, Marion County, and divers persons, firms, and corporations, and wrongfully and unlawfully, and with intent to deprive the plaintiff thereof, appropriated and converted to his own use, of the moneys so collected and received, the sum of \$3,387.18, to the plaintiff's damage in that amount; that the moneys so collected consisted of gold and silver coin of the United States and other current moneys, and, as the books of account with reference to the plaintiff's business were kept by and under the direction and control of the defendant, the plaintiff is unable to give a more specific description of the money converted by him. For a further and separate cause of action, it is alleged that in October, 1899, the plaintiff was

the owner of a warrant issued by the City of Salem in payment of services rendered it, for \$153.05, and another warrant issued by Marion County for services rendered it in the sum of \$35, and that the defendant obtained possession of both of said warrants, and wrongfully converted the same to his own use, to the plaintiff's damage in the sum of \$195. The answer admits the incorporation of the plaintiff; the defendant's employment as manager between the dates alleged in the complaint; that as such manager he collected large sums of money due from its patrons; but denies that he wrongfully or unlawfully or at all converted to his own use \$3,387.18 thereof, or any other sum. The answer admits the conversion by defendant of the city and county warrants, as alleged in the complaint, but denies that it was wrongfully or unlawfully done. For a further and separate defense to the second cause of action, it is alleged that the defendant was the duly appointed managing agent of the plaintiff, and as such had authority to receive and collect all moneys due it for services rendered, and to pay out and disburse the same in payment of current obligations, and that, acting as such agent, he received the two warrants referred to, and converted the same into cash for the use and benefit of the plaintiff. A reply put in issue the new matter alleged in the answer, and upon motion of the plaintiff, over the objection and exception of the defendant, the court referred the cause to a referee to take and report the testimony; but thereafter, by stipulation of the parties, the defendant not waiving his objection to the order of reference, the cause was tried before the court without the intervention of a jury.

From the testimony submitted, the court found, in substance: (1) That during July, 1898, the defendant, as manager and agent of the plaintiff, received from the State of Oregon, \$2,439.06, and from the City of Salem \$799, on account of services rendered by plaintiff, and paid over and accounted for only \$1,968.30 of the former sum, and \$707.28 of the latter, leaving a balance of \$562.48, which he appropriated and converted to his own use; (2) that during the month of March, 1899, the defendant collected of divers and sundry persons, firms, and corpora-

tions \$760 due the plaintiff for services rendered by it, and failed to account for any part of said sum, but, on the contrary, with intent to defraud and deceive the plaintiff, caused false entries to be made on its books, which were under his charge and control, to the effect that the said sums had been expended for stores purchased by him, when in fact no such purchases had been made; (3) that during the month of September, 1899, he collected and appropriated to his own use \$2,050.55 due the plaintiff from divers persons, firms, and corporations, and caused a like false and fraudulent entry to be made in the books of the company; (4) that in October, 1899, the defendant collected from the City of Salem \$153.05, and from Marion County \$35, due the plaintiff, and fraudulently and unlawfully failed to account therefor, but appropriated and converted the same to his own use. As conclusions of law, the court found that, by reason of the wrongful acts aforesaid of the defendant, the plaintiff was damaged in the sum of \$3,561.08, and entered judgment accordingly, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *William M. Kaiser* and *Woodson T. Slater*, with an oral argument by *Mr. Tilmon Ford* and *Mr. Slater*.

For respondent there was a brief and an oral argument by *Mr. Geo. G. Bingham*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

2. It is first insisted that the court erred in referring the case to a referee. The statute provides that the court may, upon the application of either party, or upon its own motion, direct a reference "when the trial of an issue of fact shall require the examination of a long account on either side": *Hill's Ann. Laws*, § 222, subd. 1. This provision of the statute is not an infringement of the constitutional right to a trial by jury (*Tribou v. Strowbridge*, 7 Or. 156; *Trummer v. Konrad*, 32 Or. 54, 51 Pac. 447); nor is any distinction made between an action on

contract and one of tort, but either may be referred if it involves the examination of a long account.

3. As to what constitutes such an account, within the meaning of the statute, has not been, and, in the nature of things, cannot be, exactly determined. Each case must depend upon its own facts: *Mitchell v. Oregon Flax Assoc.*, 38 Or. 503 (63 Pac. 881).

Where, however, the conclusion can be fairly drawn from facts disclosed by affidavit, or upon the face of the pleadings, that so many separate and distinct items will be litigated or examined that a jury cannot keep the evidence in mind in regard to each item, the case may be referred; and where there is a conflict in the evidence, or there is reasonable ground for controversy, as to whether the issue involves the examination of such an account, and the court below has decided to refer the cause, its conclusion will not ordinarily be disturbed on appeal. It is only when it clearly appears that no such account can be invoved that an order of reference will be reversed: *Welsh v. Darragh*, 52 N. Y. 590. This case comes within the principle stated. It not only appeared upon the face of the pleadings, but from the affidavit of the manager of the plaintiff company, that the trial would necessarily involve the examination of the accounts of plaintiff's business from June 1, 1898, to October 20, 1899, and that it could not intelligently be done by a jury. There was no error, therefore, in the order of reference.

4. It is next contended that the plaintiff's remedy was by an action on contract, and not in trover, and hence the complaint does not state facts sufficient to constitute a cause of action. As a general rule, the mere failure of an agent to pay over or account for money collected for his principal will not sustain an action of conversion, because the agent is not bound to pay over the identical money received, and the transactions create nothing more than the relation of debtor and creditor between him and his principal (*Royce v. Oakes*, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845; *Hartman v. Hicks* [Sup.], 59 N. Y. Supp. 529; *Vandelle v. Rohan* [Sup.], 73 N. Y. Supp. 285; *Walter v. Bennett*, 16 N. Y. 250; *Borland v. Stokes*, 120 Pa. St. 278, 14 Atl. 61); but where the principal is entitled to receive, and the terms

of the employment of the agent require him to pay over, the identical money received, an action of trover will lie for its conversion: *Jackson v. Anderson*, 4 Taunt. 24; *Petit v. Bouju*, 1 Mo. 49; *Bunger v. Roddy*, 70 Ind. 26; *Donohue v. Henry*, 4 E. D. Smith, 162; *Farrand v. Hurlbut*, 7 Minn. 477 (Gil. 383); *Cotton v. Sharpstein*, 14 Wis. 226 (80 Am. Dec. 774); *American Express Co. v. Piatt*, 51 Minn. 568 (53 N. W. 877). And such was the case here. The defendant was the agent and general manager of the plaintiff corporation, with power and authority to collect the moneys due it for services rendered. All the money so collected belonged to his principal. The title immediately vested in the plaintiff, and the defendant had no interest therein, and no authority to make any use thereof whatever. He was bound by the terms of his employment to pay the money over to the treasurer of the plaintiff corporation, and could not even use it for the payment of current expenses without the approval of his superior. The plaintiff, as a matter of right, therefore, was entitled to the identical money received by the defendant on its account, and any unlawful use or misapplication thereof constituted a conversion, for which an action of trover was an appropriate remedy: *Mechem*, Cas. Ag. § 476; *Henry v. Sowles* (C. C.) 28 Fed. 521; *Cotton v. Sharpstein*, 14 Wis. 226 (80 Am. Dec. 774).

5. But it is said the complaint is insufficient because it does not describe with reasonable certainty the identical money alleged to have been converted by the defendant. In the nature of things, however, that was an impossibility. The complaint shows that the defendant was the trusted agent and manager of the plaintiff, with power and authority to collect all moneys due it, and during his term of service received and collected large sums, a part of which he failed to account for, but converted to his own use. It is impossible for the plaintiff to specify or describe any particular money converted, nor was it necessary to do so. The conversion consisted of distinct acts done by virtue of the confidential relations existing between the plaintiff and defendant. These separate acts may not be capable of either allegation or proof, but the aggregate result is, and that constitutes the conversion.

No stricter rule, certainly, should be applied in an action by a principal against his agent for conversion of funds which came into his hands by virtue of his employment than would be required in a prosecution for the crime of embezzlement; and in the latter case a charge of embezzlement of a certain amount on a certain day will cover and admit evidence of a series of connected transactions, showing a continuing offense: *State v. Reinhart*, 26 Or. 466 (38 Pac. 822).

6. It is next contended that there was no competent evidence tending to support the findings of the trial court. The principal testimony was that of A. A. Cunningham, an expert accountant, who was the bookkeeper of the plaintiff during the defendant's service, and up to September 1, 1899, and who had made an examination of the books since that date. These books were kept under the supervision and direction of the defendant, and entries were made therein by his orders. Cunningham testified in detail as to the manner of keeping the books, their condition, the items of account contained and the entries made therein, and the result of his examination. His testimony was competent, under the familiar rule that where books, papers, and records are numerous, an expert may testify as to the result of his examination and investigation: *Hill's Ann. Laws*, § 691, subd. 5; *State v. Reinhart*, 26 Or. 466 (38 Pac. 822); 1 *Greenl. Ev.* (15 ed.), § 93; 1 *Jones, Ev.* § 205; *Boston & W. R. Corp. v. Dana*, 1 Gray, 83; *Hollingsworth v. State*, 111 Ind. 289 (12 N. E. 490); *State v. Findley*, 101 Mo. 217 (14 S. W. 185).

7. And it is no ground of complaint on this appeal that the books themselves were not offered or admitted in evidence. The record indicates that they were in court, and no objection was made to Cunningham's testimony because they were not offered in evidence, and therefore it cannot be urged here: *Burton v. Driggs*, 87 U. S. (20 Wall.) 125.

8. Finally it is said that, even if Cunningham's testimony is competent, it does not show that the defendant converted or appropriated to his own use any money belonging to plaintiff. We do not purpose entering upon a discussion of that question, because the weight and value of the evidence were for the trial

court. We can only examine the testimony for the purpose of ascertaining whether there was any competent evidence tending to support the conclusions of the trial judge.

9. The evidence shows that the books of account were kept under the direction and supervision of the defendant; that they indicated that certain moneys due the plaintiff were collected from the state and from the county of Marion by the defendant, and not accounted for by him; and that two false entries had been made therein by the defendant's direction, crediting one account with large sums, and charging the same to stores, when in fact no stores had been purchased. The defendant gave no evidence on the trial whatever, and did not undertake to explain any of these circumstances, or account for the false entries in the books. Their condition evidently required some explanation on his part, in the absence of which the court was fully justified in its findings. Nor was it necessary for the plaintiff to prove by evidence other than the books that money belonging to it had actually been appropriated by the defendant. The books were intended to contain a record of its business during the time the defendant was its manager, and should have accurately shown the amount of money received and accounted for by the defendant. The false entries were made therein for some purpose, and presumedly with the design of concealing from the plaintiff the truth, and covering up the wrongful acts of the defendant. The judgment is affirmed. **AFFIRMED.**

Argued 17 July; decided 4 August, 1902.

SMALL v. LUTZ.

[67 Pac. 421; 69 Pac. 825.]

RE-ENACTMENTS—STATUTES—APPEAL—SURETY COMPANIES.

1. A re-enactment of a former statute is to be read as part of the earlier and not of the new one, if the latter is in conflict with another act passed after the former but before the later act, and therefore does not impliedly repeal the intermediate act; for example, an old act provided that the qualifications of sureties on appeal bonds should be the same as in case of bail on arrest, and that they should justify in like manner if excepted to. In 1899 a law was passed authorizing surety companies to become surety on all classes and kinds of bonds, and providing that an undertaking executed by a licensed surety company should be a

41	570
46	372
41	570
48	264
48	338

full compliance with all laws and requirements as to qualification and justification of sureties; and a few days later in the same session another act was passed relating to the taking of appeals, modifying the manner of giving and serving notice, but re-enacting the old statute as to sureties. Then in 1901 there was still another act again changing the method of giving and serving both the notice of and undertaking on appeal, but continuing the old provisions as to the qualification and justification of sureties. *Held*, that the modifications of 1899 and 1901, being merely re-enactments of the law as it stood before the passage of the first act of 1899 authorizing surety companies to become sureties on undertakings in appeal, do not impliedly repeal that act, but were intended only to change the manner of giving notice of an appeal, and to require the undertaking to be served on the adverse party.

SWAMP LANDS—WHEN TITLE PASSES FROM THE GOVERNMENT.

2. The grant by the United States to certain states under the swamp land act was not a grant *in praesenti* of the land listed as in said act provided, but the listing is only a step toward transferring the title, and until the issuance of the patent the legal title remains in the general government, and its action in conveying the title is absolutely and finally conclusive: *Gaston v. Stott*, 5 Or. 48, and *Miller v. Tobin*, 16 Or. 540, overruled.

PUBLIC LANDS—HOMESTEAD ENTRY—DEED FROM STATE.

3. A determination by the Secretary of the Interior, on an application for a patent, that the lands applied for were subject to homestead entry, is conclusive as against one to whom the land had previously been conveyed by the state under a list of swamp lands the approval of which had been revoked after such conveyance and without notice to the grantee therein.

From Lake: HENRY L. BENSON, Judge.

Suit by George H. Small against Elmer D. Lutz, to remove a cloud from the title to certain land. There was a decree for plaintiff, from which defendant appealed. A motion to dismiss the appeal was overruled, and the opinion on the motion is printed with the opinion on the merits.

MOTION OVERRULED: REVERSED.

Decided 27 January, 1902.

ON MOTION TO DISMISS APPEAL.

Mr. Chas. A. Cogswell, for the motion.

Mr. Benjamin B. Beekman, *contra*.

PER CURIAM. This motion involves the sole question as to whether a qualified surety company may become surety on an undertaking for an appeal. In 1899 the legislature passed an act

authorizing such companies to become sureties on undertakings, including those required on appeals, which provides that an undertaking so executed shall be a full and complete compliance with all requirements respecting number, character, qualification, and justification of sureties: Laws, 1899, p. 195, § 6. At the same session an act was passed amending Section 537, Hill's Ann. Laws (Laws, 1899, p. 228), relating to appeals, which re-enacts the provision of the act of October 27, 1870, that the qualification of sureties in undertakings on appeal shall be the same as in bail on arrest, and, if excepted to, shall justify in like manner. In 1901 the section was again amended by requiring the undertaking on appeal to be served on the adverse party, but re-enacting the previous provision as to the qualifications of sureties on the undertaking: Laws, 1901, p. 77. The contention is that the acts of 1899 and 1901 in reference to procedure on appeal operated to repeal by implication the provision of the statute making surety companies qualified sureties in undertakings on appeal. A sufficient answer to this position is that the provision in the acts amending Section 537, in reference to the qualification of sureties on appeal bonds, is not a new legislative declaration on the subject, but merely a re-enactment of the law as it stood long prior to the act authorizing surety companies to do business in the state, and is therefore not in conflict with the latter act, and does not operate to repeal it: *Endlich*, Interp. Stat. § 194; *Eddy v. Kincaid*, 28 Or. 537 (41 Pac. 156, 655); *Powell v. King*, 78 Minn. 83 (80 N. W. 850). An examination of the amendatory acts clearly shows that the sole purpose thereof was to change the manner of giving notice of an appeal, and to require the undertaking to be served on the adverse party, and not to revise the subject of undertakings on appeal or the qualification of sureties therein. The motion is therefore denied.

MOTION OVERRULED.

Decided 4 August, 1902.

ON THE MERITS.

This is a suit to remove a cloud from the title to one hundred and sixty acres of land in Lake County. The plaintiff asserts

title under the act of congress of March 12, 1860 (12 Stat. 3), extending to Minnesota and Oregon the swamp land act of 1850 (9 Stat. 519), and the defendant through a patent from the United States under the homestead law. On September 16, 1882, the Secretary of the Interior listed and certified the tract in controversy, with other lands, aggregating over 87,000 acres, to the state as swamp and overflowed, and inuring to it under the act of congress referred to; such list being known and designated as "Approved List No. 5." On September 28, 1886, the state conveyed the land in dispute to J. M. Allen, and the plaintiff has succeeded to Allen's title by mesne conveyances. After the conveyance by the state to Allen, it was reported to the land department by one of its special agents that the report upon which list No. 5 had been prepared and approved was false and fraudulent. On January 20, 1887, the state was notified to show cause why such approval should not be set aside and revoked for that reason. Such proceedings were thereafter had in the land department that, on December 27, 1887, the Secretary of the Interior revoked and canceled the approval of list No. 5 (7 Dec. Dept. Int. 572), and the land in controversy has never been otherwise listed or patented to the state as swamp land. On March 28, 1893, the defendant settled upon and entered it under the homestead law as unappropriated public land of the United States. On January 20, 1894, he commuted his entry, and on April 15, 1895, a patent therefor was regularly issued to him in due form. This suit is for the purpose of setting aside and annulling such patent, on the ground that it is void because the land was in fact swamp and overflowed, and passed to the state by the swamp land act. The complaint alleges that the land in 1860 was, ever since has been, and now is swamp and overflowed land, within the meaning of the law of congress. This averment is denied by the answer, and oral evidence was given at the trial, over the objection of both parties, in support of their respective positions, the plaintiff objecting on the ground that the question was settled by Approved List No. 5, and the defendant that it was concluded by the patent to him. The court below held, in substance, that the approval of list No. 5 by the Secretary of the

Interior was a conclusive adjudication that the land was swamp and overflowed, within the terms of the swamp land act, and the subsequent cancellation thereof was void as to the plaintiff because made without notice to his grantor; that therefore, at the time of defendant's settlement, the land in question was not open to settlement under the homestead law, and as a consequence the patent issued to the defendant is void, and should be set aside. A decree was entered accordingly, from which the defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Watson & Beekman* with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief and an oral argument by *Mr. Chas. A. Cogswell*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

2. Whatever may have been the opinion as to the proper construction of the swamp land act prior to the decision of the Supreme Court of the United States in *Michigan L. & Lum. Co. v. Rust*, 168 U. S. 589 (18 Sup. Ct. 208), it is now settled that under such act the legal title to the land remains in the general government until patent issues, and the land department has power and authority to inquire into the legality and extent of rights claimed under the act. It is also settled that the listing and platting of certain lands to the state as swamp and overflowed, by the Secretary of the Interior, is not conclusive, but may be revoked and annulled at any time prior to the issuance of a patent by that officer or successor: *Brown v. Hitchcock*, 173 U. S. 473 (19 Sup. Ct. 485). But it is argued that the order canceling and revoking list No. 5 was void as to the plaintiff because made without notice to his grantor. As we understand the law, the fact that the grantee of the state may not have been notified of proceedings to cancel the approval of a list of lands as swamp and overflowed does not render void the action of the land department in canceling the same, but merely entitles

him to a hearing in the proper forum as to whether the lands were in fact swamp and overflowed within the terms of the grant: *Guaranty Sav. Bank v. Bladow*, 6 N. D. 108 (69 N. W. 41); *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448 (20 Sup. Ct. 425); *Hawley v. Diller*, 178 U. S. 476 (20 Sup. Ct. 936); *California Redwood Co. v. Little* (C. C.), 79 Fed. 854; *American Mtg. Co. v. Hopper*, 64 Fed. 553 (12 C. C. A. 293). Practically the same question was decided in *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448 (20 Sup. Ct. 425). In that case the final certificate of a homestead claimant had been canceled after notice to the entryman, but without notice to his mortgagee. It was held that the cancellation was conclusive against the entryman upon all questions of fact, and could not be regarded as a mere nullity when set up against his mortgagee, although the latter had no notice of the proceeding to cancel the certificate. "This result follows," says Mr. Justice PECKHAM, "by reason of the character of the entry, and of the certificate given thereon. It does not transfer the title to the land from the United States to the entryman, and it simply furnishes *prima facie* evidence of an equitable claim upon the government for a patent, and the use of the certificate for that purpose is subject to be destroyed by cancellation thereof under direction of the department. This is the legal effect of such certificates, and all who deal in them, or found any right upon them, must be held to do so with full knowledge of the character of such papers. But the cancellation, although conclusive as to the entryman upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee, and with no opportunity on its part to be heard; that is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been canceled. Had the mortgagee taken either of these courses, it might have demanded in the one case,

upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or, if a patent had been issued, the mortgagee might then have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in court to hold him as trustee."

This same principle must necessarily apply to the listing of land to the state by the Secretary of the Interior under the swamp land act. He is required to "make out an accurate list and plats of the lands" described in the act, and cause a patent to be issued to the state therefor, and upon the issuance of such patent, and not before, the legal title vests in the state. The making and forwarding to the governor of the list and plats is but one step in the process of the administration of the law. It does not transfer the title from the United States to the state, nor does it divest the land department of control over the land. It is only *prima facie* evidence of the right of the state to a patent. Until the patent has been issued, the land department may determine for itself under what circumstances and upon what notice it will revoke and cancel the list. All who deal with the state, or base any rights upon the approved list, are chargeable with knowledge of its character, and of the fact that the proceedings to secure the legal title are incomplete, and that it is within the power of the land department at any time to revoke the list; thus destroying the *prima facie* evidence of the right to a patent. If the cancellation is made without notice to a grantee of the state, it is not conclusive as to him, and does not destroy his equitable title. He still has the right to show, if the facts are with him, by evidence other than the approved list, that the land was in fact within the terms of the swamp land grant, and should be listed and patented to the state. But, in our opinion, this showing must be made to the Secretary of the Interior, and before the legal title passes from the government. By the swamp land act, it is made the exclusive duty of that officer to determine what lands are within the grant. His office is made the tribunal whose decision upon that subject is controlling. It is for him alone to pass upon that question, and his

judgment as to the character of the land is final and conclusive: *Heath v. Wallace*, 138 U. S. 573 (11 Sup. Ct. 380); *Chandler v. Calumet Min. Co.*, 149 U. S. 79 (13 Sup. Ct. 798); *McCormick v. Hayes*, 159 U. S. 332 (16 Sup. Ct. 37). When the defendant's application for a patent was made under his homestead entry, it became the duty of the Secretary of the Interior, as the head of the land department, and by virtue of his general control over the disposition of the public lands, as well as under the provisions of the swamp land act, to ascertain whether the land applied for was in fact public land, and, when the defendant's final proof was accepted, and a patent issued to him, it was in legal contemplation decided that the land was not swamp and overflowed within the terms of the grant to the state. The acceptance of defendant's final proof, and the issuance of a patent to him, were, so far as appears, made in the regular course of business and orderly administration of the laws of the United States relating to the disposition of public lands, after the usual notice in such cases. The plaintiff could have appeared and contested the defendant's right to a patent, on the ground that the land was in fact swamp and overflowed, and passed to the state by the swamp land act. He did not pursue that course, but, nevertheless, the action of the land department is as conclusive upon him as if he had appeared and made an unavailing contest.

3. It was for a time supposed, and so held by the courts and the land department, that the swamp land act was a grant *in praesenti*, so that the title to the state to such land dated from the passage of the act, and consequently that the government of the United States thereafter had no title that it could transfer to a homestead or pre-emption claimant; hence a patent to such a claimant was void, and of no force or effect whatever. According to recent decisions, particularly *Michigan L. & Lum. Co. v. Rust*, and *Brown v. Hitchcock*, this was an erroneous interpretation of the law, and, although the act is in its terms a grant *in praesenti*, the legal title to the land remains in the general government, subject to its control and disposition until a patent has been issued therefor. The title, therefore, was in the govern-

ment of the United States at the time the defendant applied for a patent, and it was the duty of the Secretary of the Interior to determine the character of the land before issuing such patent. The decision that it was open to settlement under the homestead law was, in effect, a holding that it was not swamp or overflowed within the meaning of the swamp land act, and as this involved a question of fact, to be determined on oral testimony, the decision cannot be impeached or questioned except in a court of equity, for fraud or mistake other than an error of judgment. "That department [land department], as we have repeatedly said," declares the Supreme Court of the United States in *Steel v. Refining Co.*, 106 U. S. 447, "was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And in *Burfenning v. Chicago, St. Paul, etc. Ry. Co.*, 163 U. S. 321 (16 Sup. Ct. 1018), the language of the court was: "It has undoubtedly been affirmed over and over again that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." See, also, *Smelting Co. v. Kemp*, 104 U. S. 636; *Johnson v. Drew*, 171 U. S. 93 (18 Sup. Ct. 800). It has accordingly been held that

parol evidence is not admissible to show that land covered by a patent under the swamp land act was in fact not swamp (*French v. Fyan*, 93 U. S. 169), or that land patented to a pre-emption claimant (*Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. 1157), or certified by the Secretary of the Interior as inuring under a railroad grant (*Rogers Locomotive Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188), or patent to a wagon road company (*Pengra v. Munz*, 29 Fed. 830, 12 Sawy. 231), was in fact swamp and overflowed. It has been thought that a different doctrine was announced in *Wright v. Roseberry*, 121 U. S. 488 (7 Sup. Ct. 985), but, as explained in *McCormick v. Hayes*, 159 U. S. 332 (16 Sup. Ct. 37), this is a mistaken view of the decision. *Gaston v. Stott*, 5 Or. 48, and *Miller v. Tobin*, 16 Or. 540 (16 Pac. 161), were decided prior to the recent decisions of the Supreme Court of the United States construing the swamp land act, and as the question is a federal one the decisions of that court are controlling.

The decree of the court below must be reversed, and the complaint dismissed.

REVERSED.

Argued 15 July; decided 4 August, 1902.

PARKER v. PAGE.

[69 Pac. 822.]

LEASE—EFFECT OF HOLDING OVER.

1. Where there has been a leasing for a year, or for a term of years, and the tenant holds over after the expiration of the term without objection from the landlord, the relation becomes a tenancy from year to year upon the terms and conditions contained in the original lease.

CONTINUATION OF LEASE—LIABILITY FOR IMPROVEMENTS.

2. Where a lease provided that "in case this lease cannot be continued after the expiration of * * by mutual agreement of the parties thereto, then the improvements * * shall be purchased" by the lessor, the lease was "continued" by the action of the parties in respectively paying and accepting the reserved rent after the expiration of the term limited, and the lessee thereby forfeited his right to be paid for the improvements.

From Clatsop: THOMAS A. McBRIDE, Judge.

This is an action by H. B. Parker against Chas. H. Page and James Brown, as executors, to recover upon an alleged breach of contract. On May 5, 1887, E. C. Crow leased to plaintiff lots 3 and 4, block 7, in McClure's Astoria, and the water front adjacent thereto, for the term of 10 years, from August 1, 1887, at a monthly rental of \$25, payable in advance, for each month during the term, by an agreement in writing containing the following stipulations, among others:

"And in case this lease cannot be continued after the expiration of said ten years by mutual agreement of the parties thereto, then the substantial and suitable improvements, such as wharves or warehouses, or both, that shall have been constructed by said Parker or his assigns, and shall be remaining on said lots or water front at such expiration of this lease, shall be purchased by said Crow or his assigns, of said Parker or his assigns, at a fair valuation, to be determined by arbitration in the usual manner in case the parties hereto cannot agree thereto. * * And said Parker, party of the second part, hereby engages and agrees * * to surrender the same to E. C. Crow or his assigns at the termination of this lease, or of any continuation thereof, with the improvements."

The complaint sets forth the execution of the lease, the above conditions, and the construction upon the premises of a wharf and warehouse, and their present value, and, as grounds for recovery, alleges that, at the time of termination of said lease, plaintiff called upon Crow for a renewal thereof, but, he being physically and mentally unable to attend to business, application was made to his attorney and agent, who refused to renew the same, saying that there was no money on hand with which to settle for the improvements, and further stating that the matter would be attended to, but no settlement was ever arrived at, and that Crow and his representatives, the defendants herein, refused to renew the said lease or pay the value of said improvements. The defense interposed was that the lease had been continued by agreement of the parties, in conformity to the stipulation, and, therefore, that Crow's estate was not liable for the improvements. E. C. Crow died testate, April 11, 1899, and on the 20th the defendants were appointed executors of his will.

Parker testified in substance that he saw Crow at Knappa about a year before his death, which was before the lease expired; that he then wanted to make some improvements on the wharf, and to get the lease renewed, and that was the only time he spoke to the deceased about such renewal; that a short time before Crow died, but after the lease had expired, he went to see him again, but found him in such a condition that he could not talk about the matter, whereupon he went to see Mr. Page, who, with Mr. Brown, had been appointed to look after the estate, and spoke to him about renewing the lease, but that Page urged him to keep it longer, and said that it was "all right"; that the terms of the lease would be all right; to keep it along until they could get some money, and they would settle; that they had no money, and would have to sell some of the property, and obtain it in that way; that they did not want to extend the lease or give a new one, because it would tie up the property, and they would not be able to sell, as it was their purpose, the estate being involved a good deal in debt; that he saw Page a time or two after Crow's death with the same result; that he asked leave to make improvements on the premises without regard to the lease, and let the rent run on from month to month, but he would not allow any improvements to be made, because he thought it would be settled in a few days; that Crow and he were old friends, and he continued to keep the place, and as long as he could get along he kept it, and rented it to other parties, and kept it on that account more as an accommodation than anything else; that after Crow died he went to see Mr. Powers and Mrs. Cullon, Crow's heirs, and they urged him to keep it longer; that he wanted a lease, and talked with Brown about it, who said that it would all be fixed up after awhile. It is further shown that plaintiff continued to pay the specified rental to Crow and his executors for something like two years after the expiration of the lease; that on February 9, 1898, he sublet to Borthwick, and collected rent from him, which he paid to Crow and his executors; that plaintiff finally stopped payment of rent, and, upon notice to quit, surrendered the property in obedience thereto. The plaintiff having rested his case, the court, on motion of defendants, directed the

jury to return a verdict in their favor, which having been done a judgment of involuntary nonsuit was entered against the plaintiff, from which he appeals. **AFFIRMED.**

For appellant there was a brief over the names of *John Q. A. Bowlby* and *Fulton Bros.*, with an oral argument by *Mr. Charles W. Fulton*.

For respondents there was a brief over the names of *George Noland* and *John H. & A. M. Smith*, with an oral argument by *Mr. Noland* and *Mr. John H. Smith*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The complaint is based upon the theory of a refusal upon the part of Crow and his executors, at the expiration of the term, to renew the lease for a like term of 10 years. Parker saw Crow but once, however, with reference to the lease, which was about a year prior to his death, and more than four months prior to the expiration thereof; and although he testified that he wanted to make some improvements, and get the lease renewed, it is not developed what Crow said or agreed to at that time, or whether or not he encouraged plaintiff to believe that he would accede to his wishes, or flatly refused him. In other words, the result of the conference is in no way made to appear, and it is not shown that the parties came to any understanding whatever in modification of or in respect to the agreement then in force. There appears to have been no other effort on the part of Parker to adjust the matter until after the expiration of the lease; the next being, as he said, a little before Crow's death, who being unable to talk about the matter, the conference was had with Page, who had been appointed to look after his business. Other efforts followed, after this, with the executors and heirs of the deceased, and all with the same result,—that no agreement was arrived at,—and in the meanwhile plaintiff continued in possession, and paid the rent, as before, and Crow and his representa-

tives continued to accept the same without disturbing him in the enjoyment of the premises.

1. The old and strict rule of the common law that whatever annexations were made to real property by a tenant became a part of the realty, and could only be severed by the consent of the landlord, has been much relaxed to meet the requirements of manufacturing enterprises and trade relations (*Wood, Landl. & T.*, § 526; *Alberson v. Elk Creek Min. Co.*, 39 Or. 554, 65 Pac. 978); but the present case is in no way affected by it, as it was, by the intendment of the agreement, evidently the purpose of the parties that the improvements in question were to become inseparably annexed to the realty, but that the landlord should pay the tenant for them in case the lease could not be continued, after the expiration of the term, by mutual agreement of the parties: *Kutter v. Smith*, 69 U. S. (2 Wall.) 491. By the very great weight of American authority, where there has been a leasing for a year, or for a term of years, and a holding over after the term with the tacit acquiescence of the landlord, the relationship and agreement of the parties is converted into a technical tenancy from year to year. This result springs from the act of the tenant in holding after the term, by which he becomes a trespasser, and the landlord's recognition of his lawful right to continue, by which the tort is waived; and the law implies a contract of further leasing—that is, from year to year—upon the same terms and conditions contained in the expired lease. It is optional with the landlord whether to treat the continued holding as a trespass or to regard the act of the tenant as lawful, and the tenant has no alternative but to abide his determination; but, when the landlord has once made his election by recognition of the tenancy, he cannot thereafter deny the relationship: *Wood, Landl. & T.*, § 13; 18 Am. & Eng. Enc. Law (2 ed.), 407. Such is the solicitude that the rule should be certain in its effect and operation that the courts adopting it have quite uniformly implied the contractual relationship of a tenancy from year to year even where the holding over is slight, and the landlord has either expressly or by implication elected to treat it as lawful: *Delashman v. Berry*, 20 Mich. 292 (4 Am. Rep.

392); *Mason v. Wierengo's Estate*, 113 Mich. 151 (71 N. W. 489, 67 Am. St. Rep. 461); *Peehl v. Bumbalek*, 99 Wis. 62 (74 N. W. 545); *Conway v. Starkweather*, 1 Denio, 113; *Adams v. City of Cohoes*, 127 N. Y. 175 (28 N. E. 25); *Haynes v. Aldrich*, 133 N. Y. 287 (31 N. E. 94, 28 Am. St. Rep. 636); *Cavanaugh v. Clinch*, 88 Ga. 610 (15 S. E. 673); *Wolffe v. Wolff*, 69 Ala. 549 (44 Am. Rep. 526); *Bradley v. Slater*, 50 Neb. 682 (70 N. W. 258); *Smith v. Snyder*, 168 Pa. 541 (32 Atl. 64); *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151.

2. It is urged, however, that the law creates the tenancy,—that is, implies the agreement from the acts of the parties,—and that it lacks the characteristics of a mutual agreement, such as was contemplated by the parties, the failure of which would make it incumbent upon the lessor to pay for the improvements. Mr. Chief Justice BEAN, in *Twiss v. Boehmer*, 39 Or. 359, 362 (65 Pac. 18), says: “The relation of landlord and tenant exists by virtue of a contract, express or implied, and, to constitute such a relationship, there must be an occupancy of the premises in subordination to the title of the lessor, and with his permission, express or implied.” Now the contract is none the less mutual because it is implied, and the correlative obligations are just as binding in the one case as in the other. True, the tenant’s continued holding is primarily a trespass, but the law will not permit him to gain any advantage because of his wrongdoing. Of this wholesome rule he is charged with knowledge. He is also charged with knowledge of the fact that, if he continues in possession without some different agreement respecting his holding, the landlord may then treat him as a tenant, whether he desires such relation or not. So that when a tenant holds over after his term of one or more years, although he commits a trespass in so doing, it is tantamount to an offer on his part to the landlord to continue the same relationship, but only from year to year; and when the landlord accepts the offer, which may be by implied or express assent, there is, in legal parlance, a meeting of the minds for all intents and purposes. It is said that the law raises the contract, but the parties necessarily act in view of the law; and whenever they put themselves in a condition or

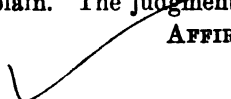
position that the law will make for them a compact with correlative obligations, which they cannot disregard without incurring liability, there springs a mutuality, a meeting of the minds, as much as though there was express assent on both sides to the contractual relations. For a more elaborate discussion of the subject, see opinion of EARL, C., in *Schuyler v. Smith*, 51 N. Y. 309 (10 Am. Rep. 609), where the same result was reached. So we conclude here that, as to plaintiff, his continuance in possession without any different agreement as to the leasing than that which was entered into May 5, 1887, was tantamount to a proffer to Crow to create a tenancy from year to year, and when Crow accepted the rent, and allowed him to continue without objection, the minds of the parties were as one, and there was henceforth a mutuality, and a complete agreement by which there was a continued leasing. Under the terms of the original lease, it was left absolutely to the option of the plaintiff whether he would agree to a continuance of the relationship with Crow. If he had declined to continue it, and surrendered possession at the end of the term, there would have been but one thing for Crow to do, and that would be to pay the value of the improvements. But, instead of taking this course, he continued in possession, and, the law charging him with full knowledge of the effect of his act in so doing, the new tenancy from year to year has been established through his own volition.

It is further insisted that the plaintiff remained in possession pursuant to an agreement that his so holding over was not to be construed as a waiver of his claim for the value of the improvements. The testimony, however, has no tendency to the establishment of such an agreement. The only conference Parker had with Crow with reference to the lease was, as we have seen, about a year prior to his death, but it is not shown that they came to any or different understanding then; and, without more, Parker continued in possession after the term, paid his rent, and the same was accepted, and so it continued for about two years or more. Other efforts to arrive at a settlement were had with the executors, but no such efforts appear to have been made until after the expiration of the lease, and it is probable that at the

time the new relations had been formed. Whether they were or not, the testimony excludes the possibility of any agreement that the holding over should not constitute or operate as a waiver of the claim for improvements, and the most that can be deduced from their several conferences is that the parties were endeavoring to readjust their relationship, which involved as well the matter of the improvements, but they were utterly unable at any time to arrive at any definite or ultimate agreement respecting the same, or to accomplish a settlement of their differences.

It is further urged that the term "continued" by intendment of the parties means "renewed," and should be so read in the lease, and, thus read, it signifies a renewal of the original term of 10 years. This would be a strained and unnatural construction of the term, as in its ordinary sense it has appropriate application in the connection in which it is employed. The lease is essentially continued under a tenancy from year to year. In either event, there could be no holding absolutely under the old lease. The relationship would be continued by a holding over, thereby creating a tenancy from year to year, as well as by a renewal, which would be the creation of a new term; so that the word "continued," in its ordinary signification, is appropriate in characterizing any continuance which may be had by mutual agreement of the parties; and we must give it that meaning here. The context or a construction of the agreement by the four corners calls for none other. In arriving at this conclusion, we have not overlooked the case of *Phillips v. Reynolds*, 20 Wash. 374 (55 Pac. 316, 72 Am. St. Rep. 107). In that case, however, the lessors agreed that at the expiration of the term they would buy the buildings or extend the lease. They attempted to relieve themselves of the obligation by granting an extension for one day, and the court very properly said the act was not within the purview of the contract, and, construing it as a whole, declared that by the intendment of the parties there should be a renewal for another term of twelve years. The lessors would not so much as afford the opportunity of a tenancy from year to year, and arbitrarily fixed a nominal limit for a new term; so that there is no such analogy between that case and this as to establish a

precedent for our construction of the present lease. Upon the evidence adduced, the plaintiff was not entitled to recover. But it is contended, however, that the court erred in directing a verdict for defendants. Without discussing the matter further, suffice it to say that the defendants took a judgment of nonsuit, and of this the plaintiff cannot complain. The judgment of the court below is therefore affirmed. **AFFIRMED.**



Decided 10 March; rehearing denied 26 May, 1902.

HARMON v. DECKER.

[68 Pac. 11, 1111.]

BOOK OF ACCOUNT AS EVIDENCE—ENTRIES NOT ORIGINAL.

1. Successive entries in a pass book, the first purporting to be two years before the second, with a year intervening between each of the others, are not admissible in evidence as original entries; it appearing by a bill of particulars attached to the complaint that many other items intervened, thus showing that the entries were only summaries copied from the ledger.

PROPRIETY OF RECEIVING CORROBORATIVE EVIDENCE.

2. Where evidence is rejected other supplementary evidence offered only in corroboration is properly rejected also.

RANK OF DAYBOOKS AS EVIDENCE.

3. Daybooks, being usually made hurriedly and not upon consideration of the interested parties, are not as conclusive evidence as contracts or other papers of that class. As an application of this, an entry in the daybook of a deceased merchant, designating a certain charge as a note, may be shown to have actually been for merchandise.

BOOKS OF ACCOUNT AS EVIDENCE OF LOANS OF MONEY.

4. The history and development of the law relating to the proving by books of account of loans of money by merchants to customers is reviewed and discussed in this case.

ENTRIES IN BOOKS AS EVIDENCE OF LOANS TO OTHERS.

5. Charges in a merchant's accounts to defendant, to cash advanced to, and checks in favor of, other persons, should be excluded, the entries not showing that they are for moneys loaned defendant or furnished others on his orders.

SECONDARY EVIDENCE—EFFORT TO FIND LOST PAPER.

6. No exact rule can be stated for determining the amount of diligence that must be expended in searching for a lost writing before secondary evidence of its contents can be received in evidence, as provided for by Hill's Ann. Laws, § 691, but the party alleging the loss must show that he has in good faith exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would sug-

gest and which are accessible; for example, secondary evidence of the contents of a writing should not be received where the person who last had the original states that he last saw it about a year before in the files of a certain case in the court house, and adds, "I have searched all the files and records,—all the papers that I have in my office; in fact, I have made a pretty clean search for it. I haven't it in my possession at all," for this amounts only to a statement that he had searched in his own office, and presumably the paper was still in the files where he last saw it.

EFFECT ON A DEBT OF ADMITTING THE INTEREST THEREON.

7. The recognition on his business books by a debtor for a series of years of an annual interest charged in favor of a certain creditor, coinciding with the charges in the books of the creditor, is not an admission of liability for the principal on which the interest was calculated.

From Josephine: HIERO K. HANNA, Judge.

This is an action by C. E. Harmon, as administrator of the estate of Horace Gasquet, deceased, to recover the sum of \$2,908.80, alleged to be due on an open account for goods, wares, merchandise, and other property sold and delivered by the deceased to Charles Decker, the defendant, a copy of which is made a part of the complaint. It is averred that an item of said account dated December 31, 1889, and designated therein as a "note," for the sum of \$5,448.51, was for merchandise and buildings purchased by defendant from Gasquet, which, by their mutual consent, was merged in said account; that plaintiff is informed and believes, and therefore alleges, that no note was ever executed therefor, but that interest on said account was charged from time to time by agreement of Gasquet and the defendant. The answer having put in issue the material allegations of the complaint, a trial was had resulting in a judgment for plaintiff in the sum of \$382.14, from which he appeals.

AFFIRMED.

For appellant there were briefs over the names of *Robert Glenn Smith* and *H. D. Norton*, with an oral argument by *Mr. Smith*.

For respondent there was a brief over the name of *A. C. Hough* (*Austin S. Hammond* of counsel), with oral arguments by *Mr. Hough* and *Mr. Hammond*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. The account began December 31, 1889, when the defendant was credited with sundry items, and charged among others, as follows:

"To amount of note.....	\$5,448.51
To int. on same for 14 mo. at 6% per annum.....	381.39
To cash advanced Karewski.....	300.00
To cash advanced Nunan.....	200.00
To bal. due from 1889.....	4,803.50"

This remainder is carried over to 1890, and the defendant is charged, among other items, with the two following:

"Int. bal. on note.....\$ 288.21"

leaving due from him, after deducting sundry credits appearing at length in the ledger, a remainder of \$4,564.62. Each year thereafter the defendant was charged with a remainder, and with the interest thereon until March 1, 1896, when, having been credited with all payments made, there was due from him, as appears from the bill of particulars, the sum of \$2,908.80, which is sought to be recovered in this action. He was also charged, among other items, with the following:

"Jan. 22, 1892. To check favor of Falkenstein.....\$ 143.30"
"Mch. 23, 1893. To check favor Levi Strauss & Co...\$ 154.22"

At the trial his counsel admitted the correctness of said account, except the items thereof hereinbefore enumerated, which they contend could not be established by a book account. The defendant, having been called as plaintiff's witness, identified his own ledger, which, being introduced in evidence, shows that his account with Gasquet purports to commence December 12, 1893, from which time the items thereof coincide with the latter's account, except that Decker does not charge himself with the principal, but only with the interest thereon. Fred Frantz, a resident of Crescent City, Cal., one of the executors in that state of the last will of Horace Gasquet, deceased, testified, as plaintiff's witness, that he found in the latter's effects a pass

book, which being identified by the witness, the following entry therein was offered in evidence, to wit:

'88	"Charles Decker Ac't.	
10—6	1375.00)	
	4073.51)	5448.51
Jan. 1st, '90,	14 months interest.....	381.39
		<hr/>
		5829.90
Charged on ac't on deductions on his bill.....		1026.40
		<hr/>
Balance due by Ch. Decker, Jan. 1, '90.....		4803.50
Paid in by Ch. D., Jan. 1, '91.....		1014.28
Bal. due Jan. 1, '92.....		3789.22
		<hr/>
		4803.50
Jan. 1, '92, Bal. due by Ch. D.....		3789.22
Condition 6% per annum.		
Security, all the buildings which were deeded to my name."		

To explain this entry, plaintiff's counsel offered in evidence the following memorandum:

"Waldo, Josephine Co., Oregon.
October 6, 1888.

"Received from H. Gasquet two drafts, No. 138 vs. Porter, Sleisinger & Co. for W. J. Wimer, sum (\$1375.00) thirteen hundred and seventy five dollars.

"Also No. 139 vs. Porter, Sleisinger & Co. for G. W. Wimer, sum (\$4073.51) four thousand and seventy three and 51-100 in payment of goods and buildings in Town of Waldo.

Rece'd. Oct. 6th, 1888.

Geo. W. Wimer.

To supplement the entry in the pass book, plaintiff offered in evidence a deed purporting to have been executed October 9, 1888, by Geo. W. and W. J. Wimer and their wives to Horace Gasquet, in consideration of \$30,000, and conveying certain lots, stores, dwellings, barns, and other buildings; and they also offered Gasquet's ledger, containing the charge against the defendant of \$5,448.51. The defendant's counsel having objected to the introduction of the deed, on the ground that neither of the subscribing witnesses thereto had been called, or their hand-

writing, or that of the grantors, proved, so as to establish the execution thereof, and to the ledger and other memorandum and receipt, on the ground that they were incompetent, irrelevant, immaterial, plaintiff's counsel stated to the court, in effect, that the pass book was offered to explain the original transaction, and the ledger to show that the sum in question had been carried into the current account; that they expected to show by Decker's books, which they would offer in evidence, that he had given Gasquet credit for interest on that sum; and that these matters, considered in connection with others, would show that there had been a consummated negotiation between the parties in respect thereto; but the court rejected the evidence offered, and allowed the plaintiff an exception.

It will be observed that the sum of the drafts specified in the receipts corresponds with the charge made on the pass book and in the ledger, and the dates also coincide. An inspection of the pass book shows that of the four debits the first was apparently made therein October 6, 1888, and the other three on the 1st day of January, 1890, 1891, and 1892. It is quite evident that these entries are not original, for when the charges therein noted are compared with the bill of particulars attached to the complaint it is found that many other items intervene, thus showing that they were not made in the usual course of the business, but are only the summaries copied from Gasquet's ledger, relating to his account with the defendant. The entry in the pass book, though made by a person deceased, was evidently not made at or near the time of the transaction, nor was it against the interest of the person making it, and hence it was not admissible as primary evidence of the fact as stated: Hill's Ann. Laws, § 767.

2. The deed, like the receipt, was offered only to corroborate the entry in the pass book, in which case it is doubtful whether the strict formality required by the statute (Hill's Ann. Laws, § 761) should be observed, as when an instrument of that character is designed to prove title or to subserve a higher purpose; but, however that may be, the pass book which was the foundation for the introduction of the receipt, deed, and ledger in evidence

having failed, the latter must also fall with it, unless the evidence proposed to be offered by plaintiff's counsel of what they expected to prove connected the pass book, receipt, deed, and ledger with the transaction, so as to charge the defendant with the sums stated as the foundation of the account. The answer denies, upon information and belief, that the sum of \$5,448.51 was intended to be charged for merchandise and buildings received from Gasquet. No testimony appears in the bill of exceptions tending to show that either of the lots or buildings so purchased by Gasquet was conveyed to the defendant, or that any agreement was ever entered into between them whereby the latter was to purchase or pay for any of the property described in Wimer's deed. "The other matters," alluded to by plaintiff's counsel in their statement of what they expected to prove, and which were to be considered in connection with the pass book, receipt, deed, and ledger, are, in our opinion, not sufficiently definite to render the offer available, and hence no error was committed in rejecting the memorandum and other documents offered in support thereof.

3. The witness Frantz having identified the day books containing Gasquet's original entries as made by his bookkeeper, and the ledger to which the defendant's account was transferred, the same were admitted in evidence as corroborative of the bill of particulars attached to the complaint, except that all entries relating to the note and interest thereon, the balance of the accounts as yearly ascertained, and the interest thereon, the cash advanced to Karewski and Nunan, and the checks issued in favor of Falkenstein and Levi Strauss & Co., were excluded, and plaintiff's counsel excepted to the court's action in these respects, and contended that errors were thereby committed. If Gasquet's day book contained any entry in relation to the origin of or consideration for the charge made against the defendant for the sum of \$5,448.51, the bill of exceptions fails to disclose it. As we understand the transcript, this sum was charged against Decker in the Gasquet ledger as a "note," and also in his pass book, as hereinbefore stated. The day books offered in evidence have not been sent up, and, so far as apparent

from the bill of exceptions, no mention whatever is made in the books of original entry of this sum. It is alleged in the complaint that the debt was incurred by the defendant's purchase of goods, merchandise, and property from Gasquet, and that no note had ever been executed as evidence thereof. We think the plaintiff had the right to contradict the entry made by Gasquet in his books, and to show, by competent evidence, that what was there designated a "note" should have been a statement of certain goods, wares, merchandise, and property sold and delivered, and the value thereof, which was provable by the books of original entry, and that nothing said by this court in *Strong v. Kamm*, 13 Or. 172 (9 Pac. 331), militates against this principle. The entry in a daybook made in the hurry and press of business does not rise to the character or dignity of a contract, or evidence the *aggregatio mentium* of the parties, so as to require the interposition of a court of equity to correct a mistake that may have occurred through the carelessness or ignorance of the book-keeper; and hence, upon principle, the entries made in such books ought to be corrected, if necessary, to make them comport with the facts which should have been recorded in the first instance. The plaintiff having alleged the facts relied upon, and they being denied, the burden of establishing them rested upon him. No memorandum in any book of original entries was introduced to substantiate the important fact referred to, nor was any testimony introduced, so far as discoverable from an inspection of the bill of exceptions, tending to show why the defendant should have been charged with \$5,448.51, or any other sum, and hence no error was committed in excluding that sum from the account.

4. As to the other item excluded by the court, some contrariety of judicial utterance exists in respect to the right of establishing the loan of money in large sums by the production of the books of original entry, unless the person so making the loan is a banker or broker. The transcript does not purport to contain all the testimony given at the trial, so that it is difficult to state, with any degree of certainty, the business in which Gasquet was engaged, but we think it fairly inferable from the

bill of exceptions that he was a merchant, and conducted general stores at Crescent City, Happy Camp, and Gasquets. It was the rule of the common law that entries made in the regular course of business by a clerk in the shop books were admissible in evidence after the death of such clerk, on proof of his handwriting: *Welsh v. Barrett*, 15 Mass. 380; *Walker v. Curtis*, 116 Mass. 98. This rule was first extended in the United States to cases in which the person making the entry is still living, and verifies the memoranda, though he may not remember the facts so entered; but such entries are not admissible in the lifetime of the clerk, unless they would be admissible after his death, upon proof of his handwriting: *Spann v. Baltzell*, 1 Fla. 301 (46 Am. Dec. 346). The rule was further expanded in this country so as to admit in evidence entries made by the parties themselves, as well as those made by their clerks, to prove the price of goods, the sale or delivery thereof, or the performance of work or labor: *Union Bank v. Knapp*, 3 Pick. 96 (15 Am. Dec. 181); *Merrill v. Ithaca & O. R. Co.*, 16 Wend. 586 (30 Am. Dec. 130). In *Bracken v. Dillon*, 64 Ga. 243 (37 Am. Rep. 70), it was held that, before the books of a merchant or other tradesman can be used to prove an account, it must appear that he has no higher evidence of its truth, and therefore that he had no clerk who sold the goods, or that clerk, if he had one, is dead, beyond the jurisdiction, or otherwise inaccessible; if he had no clerk who sold the goods, or the clerk is inaccessible, then, before he can introduce the books, the bookkeeper, if accessible, must be produced to prove that it is the book of original entries; if he had none, or he is inaccessible, then he may prove that it is the book of original entries himself; books are secondary evidence, and only admissible *ex necessitate rei*; that the books will not establish considerable items for cash, nor accounts of third persons transferred to defendants, nor are they admissible at all to show the authority to make such transfer. They may be admitted to show that a transfer was made pursuant to previous authority.

While books of original entry are admissible to prove the price, sale, and delivery of articles, and the performance of labor or

the rendition of service, because such entries are made in the usual course of business, such books are generally inadmissible to prove the loan of large sums of money, because transactions of this character are usually evidenced by promissory notes, checks, and bills of exchange. Thus, in *Veiths v. Hagge*, 8 Iowa, 163, the defendant, by way of set-off to the plaintiff's action, pleaded an account which contained, among others, several items charged against the plaintiff as "cash \$100," and "cash \$146." After having produced the necessary preliminary evidence in verification of his books of account, and after having proved by one Jensen, who was defendant's clerk from March, 1855, to March, 1856, that plaintiff during that time was a customer of the defendant, and in the habit of borrowing sums of money of him from time to time, which were charged in said books of account, without offering any other evidence in support of said cash items, the defendant offered to prove the same by said books. The court charged the jury that "cash, except in small items, to the amount of ten dollars or thereabouts, which appear to have been furnished in the ordinary course of dealing between the parties, is not the subject of the book account, and cannot be proved by the books alone. But, to entitle the defendant to recover for such items, there must be other evidence than what the books furnish. If there is evidence, other than the books, that the money was loaned to the plaintiff, items of such character the jury will allow." Mr. Justice STOCKTON, in speaking for the court in deciding the case, after reviewing many decisions from other states supporting this principle, says: "We think the general rule is clearly established by these authorities that a charge for 'money paid' or 'money lent' cannot be proved by the party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another." To the same effect, see *Lyman v. Bechtel*, 55 Iowa, 437 (7 N. W. 673); *Culver v. Marks*, 122 Ind. 554 (23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377); *Lehmann v. Rothbarth*, 111 Ill. 185; *Kelton v. Hill*, 58 Me. 114; *Winner v. Bauman*, 28 Wis. 563.

5. While the loan of large sums of money is usually evidenced in the manner indicated, and the payment thereof by receipts, these items may be proved by the books of a banker or broker, when such is in pursuance of his ordinary business method: *Union School Furn. Co. v. Mason*, 3 S. D. 147 (52 N. W. 671). What shall be considered as a large sum of money, the loan of which cannot be established by the mere production of books of account, will probably ever remain problematical. The growth of commercial enterprise must necessarily expand the methods of transacting the business pertaining thereto, including the mode of evidencing such facts, and as courts are not called upon to make, but to enforce, the rules adopted by experience, it would seem to follow that what, a few years ago, would have been regarded as a large sum of money, must now be considered as a mere bagatelle, so that the standards as formerly fixed cannot longer remain as guides of procedure. Admitting that Gasquet was not a banker, and conceding that he was only a general merchant, we are not prepared, nor is it necessary, to say that the sum of \$300 advanced to Karewski, and the smaller sums involved in this appeal, were "large sums," within the meaning of the rule discussed by the authorities, to which attention is called. We rest our decision upon the principle that the items adverted to, and excluded by the court, do not appear from an inspection of the original entries to have been money loaned to the defendant or furnished to others upon his orders. The production of the books of account did not, therefore, establish a charge against the defendant in respect to such items, and before the fact could be established testimony should have been introduced explaining the ambiguity, and imposing upon the defendant a liability therefor. The plaintiff having failed in this respect, no error was committed in excluding the items above referred to. If Gasquet took a note to evidence the sale of the goods, wares, merchandise, and property alleged to have been purchased by the defendant, as would appear from an inspection of the defendant's account of 1890 and 1891, the production of the instrument or the proof of its loss would establish its execution, and hence the note could not be the subject

of a book account without rendering the defendant also liable on the instrument, if it should be found in the hands of a person to whom it had been assigned for value before maturity.

Other errors are assigned, but, not considering them important, the judgment is affirmed.

AFFIRMED.

Decided 26 May, 1902.

ON PETITION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion.

6. Plaintiff's counsel, having filed a petition for a rehearing, contend therein that the trial court rejected material testimony to their prejudice, which action it is said this court failed to consider, although duly assigned as error. At the trial, in order to show that defendant was indebted to Gasquet's estate in the sum sought to be recovered, they attempted to prove the contents of a lost instrument by Fred Frantz, who testified that, as one of the executors of the last will of Horace Gasquet, deceased, he found among his papers a statement of account which he thought was in Decker's handwriting; that this document was lost or mislaid; that he supposed it had been sent to plaintiff at Grants Pass, Oregon; that he had searched among all the effects in his possession at Gasquet and Crescent City, California, and was unable to find the missing paper. Referring to the statement and to persons residing at Grants Pass, where the trial was held, he was asked to state what inquiries he made there, and of whom, to which he replied: "Made inquiries of Mr. Harmon, and searched everywhere at home, and can't find it." Plaintiff, appearing as a witness in his own behalf, testified that, as administrator of Gasquet's estate in Oregon, he received from Frantz what purported to be a statement of account between Decker and Gasquet, dated about December 31, 1895, and that about a year prior to the trial it disappeared from the files of the estate at the court house in Josephine County, and he did not know what had become of it. In answer to the question, "What search have you made for it since that time?" the witness said: "I have

searched all the files and records,—all the papers that I have in my office; in fact I have made a pretty clean search for it. I haven't it in my possession at all. Q. Have you searched in all places where it could be, to your knowledge? A. I have." The witnesses Frantz and Harmon having been requested to state in detail the contents of the statement of account, the court refused to hear such testimony, and exceptions were reserved, whereupon plaintiff's counsel stated to the court that they expected the answers of the witnesses to show that they had seen the lost statement; that it was in Decker's handwriting, dated about December 31, 1895; and that it showed a balance of \$2,908.80 due from him to Gasquet.

The question to be considered is whether the court erred in not receiving the testimony so offered. To avoid the presumption that higher evidence would be adverse from inferior being produced (Hill's Ann. Laws, § 776, subd. 6), a party is expected to furnish the best evidence obtainable. When primary evidence of a material fact cannot by a reasonable effort be secured, secondary evidence of the contents thereof is often admissible. Thus, the rule that there shall be no evidence of the contents of a writing other than the writing itself is subject, among others, to the following exception: "When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default": Hill's Ann. Laws, § 691. No precise rule can be prescribed as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of a document must show that he has in good faith exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would suggest, and which are accessible to him: *Wiseman v. Northern Pac. R. Co.*, 20 Or. 425 (26 Pac. 272, 23 Am. St. Rep. 135). It will be remembered that Harmon testified that the statement of account was last seen in the court house at Grants Pass, about a year prior to the trial, which was held November 20, 1899. His testimony fails to show, however, that he made any examination of the papers on file at the court house in said county, unless such fact is to be

inferred from his affirmative answer to the question: "Have you searched in all places where it could be, to your knowledge?" The answer to this interrogatory must be held insufficient, for otherwise the witness, and not the court, would be the judge of the places to be examined for the discovery of lost documents. Harmon says he "searched all the files and records," which, at a casual glance, might seem to imply that he had made an examination of the papers on file at the court house in said county in the matter of the estate of Horace Gasquet, deceased; but by limiting the investigation to "all papers that I have in my office" he necessarily excludes an examination of the papers at the court house where the statement of account was filed. The document having been filed in the proper office, search should have been made in such office to rebut the presumption that it remains there: Hill's Ann. Laws, § 776, subd. 33; Jones, Ev. § 213. No direct testimony having been offered to the effect that the court house had been searched for the discovery of the missing paper, the plaintiff failed to make the showing required, in order to let in secondary evidence of the contents of the statement of account, and no error was committed in its exclusion.

7. Plaintiff offered in evidence Decker's books, which disclosed that his account coincided with Gasquet's in respect to the annual interest purporting to be due from him. The court, referring to such entries in charging the jury, said: "These items, standing alone, would not be sufficient to warrant you in saying Mr. Decker thereby admitted the amount claimed on the part of the plaintiff. If the plaintiff had offered evidence, and it had been admitted by the court, showing that Mr. Decker had actually owed Mr. Gasquet the amount claimed in the complaint, and that Gasquet was entitled to charge interest on the same, then the credits on Mr. Decker's books might be considered as a circumstance tending to support the plaintiff's claim; but in the absence of other evidence, the entries in Decker's books would not warrant you in saying that the items claimed on the part of the plaintiff were thereby admitted by Mr. Decker." It is contended that the court erred in giving this instruction. To render it intelligible it is deemed necessary to state that Gasquet's

books show that his account purports to have begun December 31, 1889, with the following charge:

"To amt. of note.....\$5,448.51
To interest on same, 14 mo. @ 6% per annum..... 381.39"

leaving, as apparently due him, after deducting certain payments made by Decker, a remainder of \$4,564.62, the interest upon which, for the year ending December 31, 1890, is \$288.21. The account is balanced each year, and the new principal forms a base upon which interest is charged, as follows: 1891, \$373.87; 1892, \$227.35; 1893, \$195.06; 1894, \$182.13; 1895, \$157.36,—leaving due March 1, 1896, as disclosed by Gasquet's account, \$2,908.08, but according to the defendant's books only \$382.14, for which judgment was given. The instruction complained of presents the question whether Decker's entry in his books of the annual interest, which coincided with Gasquet's account thereof, affords a conclusive recognition of the debt and a promise to pay the sum upon which such interest is calculated. The fact that in consequence of certain payments made by him the annual interest charge was constantly diminishing is a circumstance tending to show that he promised to pay the principal originally charged to him, and hence rendering him liable for the sum found to be due March 1, 1896, as disclosed by Gasquet's books. While such circumstance raises an inference in favor of plaintiff's theory of the case, we do not think it irresistibly follows that because Decker recognized the interest by annually entering in his books a memorandum thereof he thereby in the absence of any testimony upon the subject, conclusively evidenced a promise to pay the principal upon which such interest is calculated. Interest is ordinarily an incident of and follows the principal upon which it is based, the latter being the substance and the former its shadow; but because the interest is an incident of the principal it does not irresistibly lead to the conclusion that the principal follows the interest. It would appear from Gasquet's books that the debt with which Decker was charged was originally incurred on account of certain buildings conveyed by George W. and W. J. Wimer to Gasquet. No evi-

dence was introduced tending to show that these buildings ever became the property of Decker, or that he agreed to purchase them, or that any consideration ever existed for the debt so charged to him. If Decker had agreed to purchase the property, the fact could undoubtedly have been established without resorting to such an indirect method of inferring the existence of the debt as by a mere credit upon his books of an annual interest thereon; for it may be that such interest was the rent agreed to be paid for the use of the buildings. We think the court's charge was warranted by the evidence, and no error was committed in giving it. It follows that the petition for rehearing is denied.

REHEARING DENIED.

Decided 30 June, 1902.

LE CLARE v. THIBAUT.

[69 Pac. 552.]

41 601
47 150

NOTE AND MORTGAGE—ANSWER.

1. The answer in a suit to foreclose a mortgage securing a note for the purchase price of certain property, alleging that when the property was bought "it belonged to the E. Co.," and that plaintiff had no interest in it; that the note and mortgage were taken in his name, in trust for said company, and defendant had paid the money due on the note to said company,—is bad, as against demurrer, it not alleging that said company was a corporation or partnership, or was authorized to receive the money, or capable of discharging defendant because of such payments, and in not stating the right of the company to receive the money.

SUIT TO FORECLOSE MORTGAGE—EQUITABLE COUNTERCLAIM.

2. An answer in a suit to foreclose a mortgage securing a note for the price of an interest in a mine alleging that plaintiff made an agreement to purchase, at the lowest price, such interest for defendant; that subsequently plaintiff falsely represented that he was the owner of an interest therein, which had cost \$2,500, when he had paid only \$2,165 therefor, and defendant, relying thereon, purchased the interest for \$2,500, giving the note and mortgage as part payment; that defendant sent money to operate the mine, but plaintiff converted part of it to his own use, falsely representing that he had used it for expenses,—does not state a counterclaim in equity under Hill's Ann. Laws, § 73, as modified by Section 393; the only matter alleged which is at all connected with the contract on which the suit is founded, and the subject of the suit, the note and mortgage, being misrepresentation as to the cost of the interest in the mine, which it is not reasonable to suppose defendant had in contemplation when executing the note.

PLEADING—SEPARATE STATEMENT OF COUNTERCLAIM.

3. Under Hill's Ann. Laws, § 73, subd. 1, providing that each defense and counterclaim shall be separately stated, a counterclaim is not well pleaded where joined with the other parts of the defense.

COUNTERCLAIMS AVAILABLE AS OFF SETS IN EQUITY.

4. Counterclaims arising in a different right from the cause of complaint will sometimes be allowed in equity, under unusual circumstances.

EQUITABLE SET OFF AGAINST AN INSOLVENT.

5. The insolvency of the person against whose demand a counterclaim is sought will justify equitable interference in cases not provided for by statute.

PLEADING COUNTERCLAIM—ADMITTING PLAINTIFF'S DEMAND.

6. In pleading a counterclaim there must be something to claim against, so that of necessity the demand of plaintiff must be at least partially admitted.

REQUISITES OF AN ANSWER STATING A COUNTERCLAIM.

7. An answer which is intended to contain a counterclaim must state a cause of action or suit against the plaintiff and in favor of the pleader, and the omission of a material averment will be fatal; for instance, a suit having been brought to foreclose a mortgage securing a note, a plea of counterclaim alleging fraud in the sale on which the note was based, and a subsequent misappropriation of funds by plaintiff as defendant's agent, is not good because it does not show that any damage resulted from the fraud, or that any accounting has been demanded of plaintiff and refused.

COUNTERCLAIM FOUNDED ON TORT.

8. A counterclaim may be based on a breach of the contract sued on, though the breach amount to a tort.

From Baker: ROBERT EAKIN, Judge.

This is a suit by Edmond D. Le Clare against N. H. Thibault and another to foreclose a mortgage. It is alleged in the complaint that on April 6, 1901, the defendants, in part consideration for the purchase of an interest in certain quartz mines in Baker County, Oregon, executed to plaintiff their promissory note for the sum of \$2,000, payable in six months, with interest, secured by a mortgage on the premises so purchased; that, no part of the note having been paid, the prayer is that the mortgage be foreclosed, and said interest in the mines be sold to satisfy the debt. The answer denies the material allegations of the complaint, except as hereinafter stated, and avers as a first separate defense that at the time said property was purchased it belonged to the Empire Mining Company, and plaintiff did

not then own, nor has he since secured, any interest therein; that the note and mortgage were taken in his name in trust for the company; and that the defendants have paid said company the sum so secured since this suit was instituted. For a second defense, and by way of counterclaim, it alleges, in substance, that about March 1, 1901, an agreement was entered into whereby plaintiff was to purchase, at the lowest price, an interest in said mines for the defendant N. H. Thibault, who was to furnish him the money therefor, and give him \$50 a month for his services in operating the mines and one-fifth of the net proceeds of their output; that about April 6, 1901, plaintiff falsely represented to said defendant that he was the owner of an undivided one-fourth interest in said mines, and the latter, relying thereon, was induced thereby to purchase said interest for \$2,500, paying \$500 down, and giving the note and mortgage mentioned in the complaint; that N. H. Thibault, being absent from said county, sent the necessary means to operate the mines, requesting plaintiff to furnish monthly statements of the expenses incurred, and he, complying therewith, but intending to cheat, wrong, and defraud said defendant, falsely reported that he had expended certain sums greater than those actually paid out, thereby converting to his own use the difference between the payments so made and those represented, but, plaintiff having neglected to keep any books, it is impossible for defendants to state the sums so appropriated, excepting in the following particulars: That he induced the employees at the mines to execute blank receipts, wrote over their signatures false sums purporting to have been paid them, and fraudulently represented that he had incurred on account thereof an expense of \$2,449.35, when he had so expended only \$1,527.60; that he wrongfully represented that said interest in the mines cost \$2,500, when he paid therefor only the sum of \$2,165; and that plaintiff is insolvent and unable to respond in damages. The prayer of the answer is that an accounting be decreed between the parties concerning all matters arising out of the relations existing between them, and, if any sum be found due plaintiff on the note, it may be offset by such sums as may be ascertained to be due from him to the defendant

N. H. Thibault, and that the latter may have a decree against him for any remainder of such overpayments. A demurrer to the separate defenses on the ground that neither stated facts sufficient to constitute a defense having been sustained, and the defendants declining to plead further, a decree was rendered against them foreclosing the mortgage, and they appeal.

AFFIRMED.

For appellants there was a brief over the name of *Smith & Heilner*, with an oral argument by *Mr. Joseph J. Heilner*.

For respondent there was a brief and an oral argument by *Mr. Chas. A. Johns*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is not alleged in the first separate defense that the Empire Mining Company is either a corporation or a partnership, or that it was authorized to receive the money due on the note, or capable of discharging the defendants from their liability in consequence of the alleged payment. The allegations of new matter in the answer having been challenged by demurrer, the averments of fact therein are to be most strongly construed against the pleader (*Cederson v. Oregon Nav. Co.*, 38 Or. 343 (62 Pac. 637, 63 Pac. 763); and, the answer having failed to state the right of the alleged *cestui que trust* to receive the money, no error was committed in sustaining the demurrer to this part of the answer.

2. It is contended by defendants' counsel that the averments of fact in the second separate defense are such that a suit thereon might be maintained by the defendants against the plaintiff, and that the matters thus alleged are so connected with the subject of the suit as to constitute a counterclaim in equity, and therefore the court erred in sustaining the demurrer to this part of the answer. The statute prescribing the mode of putting in issue the averments of the complaint and of alleging facts establishing a defense in an action at law is as follows:

"The answer of the defendant shall contain: (1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition": Hill's Ann. Laws, § 72. The counterclaim mentioned in section 72 must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract, or transaction set forth in the complaint as the foundation of the plaintiff's claim. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action: Hill's Ann. Laws, § 73. In suits in equity, however, the statute prescribing this form of defense is as follows: "The counterclaim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases specified in the subdivisions of section 73, it is sufficient if it be connected with the subject of the suit": Hill's Ann. Laws, § 393. Construing these sections in *pari materia*, and changing the word "action" to "suit," the rule applicable to a counterclaim in equity would be an enlargement of subdivision 1 of Section 73, identical with Section 150, Howard's New York Code, from which it was probably copied, making it read as follows: "A cause of suit arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the suit." While the common-law forms of action have been abolished in this state (Hill's Ann. Laws, § 1), the distinction between actions at law and suits in equity has not been abrogated (Hill's Ann. Laws, § 380; *Beacannon v. Liebe*, 11 Or. 443, 5 Pac. 273; *Ming Yue v. Coos Bay Nav. Co.*, 24 Or. 392, 33 Pac. 641; *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904). Thus, in a suit to foreclose a mortgage, a demand triable before a jury, and having no relation to the subject of the suit, cannot be used as a set-off to the plaintiff's de-

mand: *Burrage v. Bonanza G. & Q. Min. Co.*, 12 Or. 169 (6 Pac. 766). A counterclaim in equity must be connected with the subject of the suit, and contain such an averment of facts as to authorize the defendant to maintain a suit thereon against the plaintiff: *Sears v. Martin*, 22 Or. 311 (29 Pac. 890). "The subject of the action," says Mr. Bliss in his work on Code Pleading (section 126), "is, ordinarily, the property or contract and its subject-matter, or other thing involved in the dispute." To the same effect, see Pomeroy, Code Rem. § 775; 22 Am. & Eng. Enc. Law (1 ed.), 396. According to this definition, the subject of the suit in the case at bar is the promissory note and its incident, the mortgage, given to secure its payment. The matters set forth in the second separate defense, except in one particular, did not arise out of the contract set forth in the complaint as the foundation of plaintiff's claim, and it remains to be seen whether the averments of fact in the answer are connected with the subject of the suit. The connection of the counterclaim with the subject of the suit, to render it available, must be direct and immediate, and such as it is reasonable to assume that the parties had in contemplation when dealing with each other: 22 Am. & Eng. Enc. Law (1 ed.), 397; Pomeroy, Code Rem. § 794. The only part of the answer that is at all connected with the subject of the suit is the averment that plaintiff wrongfully represented that the interest in the mines which he purchased for the defendant N. H. Thibault, and for which the note was given, cost \$2,500, when he paid therefor only \$2,165. It is unreasonable to suppose that the defendants, when they executed the note, had any thought of the plaintiff defrauding them, or that he intended to wrong N. H. Thibault in purchasing an interest in the mines for him; and, as the contemplation of the parties when entering into the contract or performing the transaction which forms the subject of the suit constitutes the test of the connection with it, it follows that the facts alleged in this part of the second separate defense do not bring the case within the provisions of subdivision 1, Section 73, Hill's Ann. Laws, as modified by section 393 thereof; and the counterclaim, in so far as it relates

to the purchase price of the interest in the mines, is not available on that ground.

3. Another reason why the alleged misrepresentations in respect to the purchase price of an interest in the mines cannot become the foundation of a counterclaim grows out of the failure of the defendants to comply with the statute prescribing the method of alleging the facts constituting such defense, which is as follows: "The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they are intelligibly distinguished": Hill's Ann. Laws, § 73. The subject of the suit being the note, the only part of the defense that could be in any manner connected therewith is the alleged misappropriation by the plaintiff of a part of the purchase price, and, as the facts constituting such defense are not separately stated, but are joined with the other parts of the defense, the counterclaim cannot be based upon subdivision 1 of section 73, as modified by the rule in equity prescribed by section 393.

4. It is maintained by defendants' counsel that the averments of facts constituting the second separate defense conclusively show that in pursuance of a contract entered into between the parties plaintiff became the agent of the defendant N. H. Thibault, and, having converted to his own use money belonging to the latter, the fiduciary relation thus established and the alleged insolvency of the plaintiff give a court of equity jurisdiction of the counterclaim, independent of the provisions of the statute regulating the applicability of such defenses, and hence the court erred in sustaining the demurrer to this part of the answer. Invoking the maximum that equity will not suffer a wrong without a remedy, it has been held that a counterclaim arising in a different right will sometimes be allowed in a suit by reason of circumstances that render it equitable to do so: *Burrage v. Bonanza G. & Q. Min. Co.*, 12 Or. 169 (6 Pac. 766); *McDonald v. Mackenzie*, 24 Or. 573 (14 Pac. 866); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616).

5. The rule is well settled that the insolvency of a party against whose demand a counterclaim is sought to be interposed is a sufficient ground for equitable interference in cases not provided for by statute: *Waterman, Set-Off*, § 431; *Wray's Adm'rs v. Furniss*, 27 Ala. 471; *Pond v. Smith*, 4 Conn. 302; *Doane v. Walker*, 101 Ill. 628; *Keightley v. Walls*, 27 Ind. 384.

6. Assuming, without deciding, that the allegations constituting the second separate defense are sufficient to confer upon a court of equity jurisdiction of the subject-matter, we will examine the averments of new matter in the answer to see if they state facts sufficient to constitute a defense. Before a defendant can be permitted to plead a counterclaim as a defense to plaintiff's cause of suit, he must admit the existence, at least, of a part of his adversary's demands: *Dove v. Hayden*, 5 Or. 500. In the case at bar, the answer having specifically denied each material allegation of the complaint "except as hereinafter stated," it may well be doubted if this qualified denial permits the defendants to rely upon the counterclaim interposed.

7. An answer setting up a counterclaim must contain the substantial requisites of a complaint, and allege facts which legally entitle the defendant to recover in a suit instituted by him for that purpose against the plaintiff; and, if his pleading omits any allegation that would be necessary to state a cause of suit, it will be vulnerable to a demurrer interposed on that ground: 19 Enc. Pl. & Prac. 753, 754. To secure an accounting in equity, it is necessary to allege that the party seeking such relief has made a demand therefor of the adverse party, who refused to comply therewith: 1 Enc. Pl. & Prac. 98; *Perry v. Foster*, 62 How. Prac. 228; *Magauran v. Tiffany*, 62 How. Prac. 251.

8. While the counterclaim relied upon would seem to sound in tort, it is alleged to have originated in contract, and a demand arising upon contract is none the less available to a defendant in a suit on the contract because a breach thereof may amount to a tort (22 Am. & Eng. Enc. Law, 1 ed., 390); and, this being so, to render the counterclaim available it was necessary to allege the nature of the contract, the extent of the breach, and the amount of damages (19 Enc. Pl. & Prac. 761; *Merrill v. Everett*,

38 Conn. 40). The answer does not state that the defendants sustained any damage by reason of plaintiff's alleged fraudulent representations, nor does it aver that they demanded of him an accounting. The plaintiff may have fully compensated the defendants for all damages they sustained in consequence of his alleged false representations, and, if he did so, they have no cause of suit against him. The answer having failed, in the particulars indicated, to state facts sufficient to constitute a counterclaim, no error was committed in sustaining the demurrer, and the decree is affirmed.

AFFIRMED.

Argued 22 July; decided 18 August 1902.

WEST v. EDWARDS.

[69 Pac. 992.]

ADVERSE HOLDING—PRIVITY OF POSSESSION—EVIDENCE.

1. In establishing adverse possession consisting of successive holdings, privity between the successive holders is necessary, but this may be by oral as well as written contract, if the holdings all refer to one source of claim, and there is actual possession.

NATURE OF POSSESSION UNDER CONTRACT TO PURCHASE.

2. One in possession of realty under a contract to purchase cannot claim adversely to his vendor until after performance of his part of the agreement; but thereafter his holding is in his own right, without reference to the completion of the contract by the vendor.

ADVERSE POSSESSION—EVIDENCE OF PRIVACY AND CONTINUITY.

3. The owner and occupant of a tract containing one hundred and fifty acres sold and contracted to convey the entire tract. The purchasers went into possession of the whole tract, and received a deed which was supposed to convey all, but which omitted a triangular piece of about nine acres. Thereafter they sold and delivered possession of the whole tract, giving a deed containing the same description as in the deed to them. From such purchaser the title and possession passed through various conveyances to plaintiff, each purchaser holding possession of the entire tract until he passed the possession to his vendee. More than ten years after the first sale, their grantor having died, the first purchasers obtained deeds to such omitted nine acres from all their grantor's heirs, and legatees. *Held*, that defendants' possession of the nine acres was adverse to their grantor from the time they received their first deed, and that there was such privity and continuity of possession between them and the subsequent purchasers, to and including plaintiff, that the title of such

original owner and his heirs was lost before such heirs executed deeds to defendants, and they acquired no title or interest in such nine acres by such deeds.

From Marion: REUBEN P. BOISE, Judge.

Suit to quiet title by A. L. West against Arthur and Thomas Edwards. From a judgment for plaintiff, defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. B. F. Bonham* and *Mr. Carey F. Martin*.

For respondents there was a brief over the names of *John W. Reynolds*, *William H. Holmes* and *Alva O. Condit*, with an oral argument by *Mr. Reynolds* and *Mr. Holmes*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit instituted September 4, 1901, to quiet the title to certain real property, consisting of eight acres, more or less, of which plaintiff is in possession, claiming title thereto by adverse possession, extending back through himself and predecessors to June 8, 1891, and the defendant Arthur Edwards claiming by deed from the heirs and legatees of Thomas H. McIntire, deceased. The decree of the court below being in favor of the plaintiff, the defendants appeal.

The facts are that Thomas H. McIntire had been the owner and in the exclusive possession of the property for more than eighteen years prior to May 6, 1891, upon which latter date he executed to Arthur Edwards a bond for a deed or contract for the conveyance of a tract of land, designated as containing 150 acres, more or less, which included the parcel in controversy, for the consideration of \$5,250, the conveyance to be made upon the payment of the second installment thereof of \$3,050 on July 6, 1891, \$1,000 having been paid in cash, and by the same instrument Edwards agreed to execute to McIntire a mortgage on the premises, to secure the balance of \$1,200, payable on or before May 1, 1895. Upon the execution of this bond, or shortly

thereafter, McIntire surrendered, and Arthur Edwards and his father, Thomas Edwards, entered into the possession of the whole of such tract. The second installment designated in the bond or contract having been paid, McIntire and wife, on June 8, 1891, executed and delivered to Arthur Edwards a deed, but which omitted the parcel in dispute, and this was accepted by him and placed of record. On August 25, 1892, Arthur Edwards gave his deed to the Oregon Land Company, containing the same description as the McIntire deed, and in the meanwhile Arthur and Thomas remained in possession, exercising ownership over the whole, and continued thereon until October or November, when the Oregon Land Company entered into possession of the same tract, occupying and improving the same, until on March 19, 1898, at which time it made a general assignment to Charles Scott for the benefit of its creditors, which assignment included the property in dispute. Scott thereupon entered into possession, and on November 20, 1900, conveyed and surrendered the same to B. B. Cronk. The plaintiff derives title and possession from Cronk, his deed bearing date March 12, 1901. McIntire having died in the meanwhile, Arthur Edwards, on July 18, 1901, obtained a quitclaim deed to the premises from his widow, heirs and legatees, who derived from McIntire whatsoever title he had thereto through his last will and testament.

It will be readily seen from these facts, which are uncontroverted, that in order to prevail plaintiff must first establish the further fact that Edwards began to hold adversely to the McIntires and all other persons prior to or at the time Arthur obtained his deed from McIntire; and, second, a continued adverse holding through his predecessors and by himself from that time on for a period of ten years. The pivotal dispute centers about the transaction between McIntire and the Edwardses, and the conveyance and delivery of possession by Arthur Edwards to the Oregon Land Company. There is testimony tending strongly to show that Arthur Edwards took the contract for a deed and the title deed itself in his name for the purpose of holding the property in secret trust for his father, who at that time was having trouble with his wife, and from whom he subsequently procured a divorce.

Arthur was at the time but 22 years of age, had little or no means, and furnished, if anything, only about \$500 towards the purchase from McIntire; while the father paid upon the contract to the time the deed was made more than \$3,500, if not the entire amount, and subsequently paid interest on the balance to the school fund, and, very shortly after the sale to the Oregon Land Company, Arthur assigned to him the mortgage that was executed to secure a portion of the consideration of the sale to such company. Other testimony tends strongly in the same direction, and we are convinced that such was the case. The inquiry is not of very great importance, however, except that it renders competent and relevant much that Thomas Edwards has said relative to the purchase from McIntire and the sale to the Oregon Land Company, to which we will now briefly allude.

The allusions herein to Arthur Edwards and the Edwardses interchangeably touching possession and title are made in view of such existing trust relations, and should be so understood. I. M. Wagner testifies that the old gentleman (meaning Thomas Edwards) told him since this suit was begun "they had supposed the place to be sold when they sold the rest of it,—this place in dispute,—but, finding it was not described in the transfer, they just let it alone"; and on cross-examination says: "That was in reference to this suit. I asked him if he had instituted a suit for possession of a part of the old place, and if he had not sold the place and got his pay for it; and his answer was they supposed they had sold the whole of it, but when the deed was made out this particular part was not described in the transfer, so they let it alone." B. B. Cronk testifies that the old gentleman told him that he had bought this property from McIntire, and sold the same and got his money for it; that witness asked him about the matter, especially with reference to making a warranty to the title, and he answered that the title was all right, and that no man had any claim on that property. In this Cronk is corroborated in part and contradicted in part, the old gentleman denying *in toto*. Arthur Edwards testifies that he held possession until November 1, 1892, and that he then gave the Oregon Land Company possession. He says, however, that he told

the Oregon Land Company at the time of its purchase that he could not sell this piece, and that he especially reserved it. Mrs. McIntire, the widow of Thomas H., testifies that they sold to the old gentleman, and that he went into possession about the 10th of April or May, 1891, when they went out; that they sold to him all the land they had there, and surrendered possession of the whole. It is admitted by defendants that at the time Arthur received the deed from McIntire he supposed he was obtaining a conveyance to the entire McIntire farm, and they also admit that the Oregon Land Company, when Arthur surrendered the same, took possession of "the entire field, including the small triangular piece, to which neither it nor its grantor had any deed." W. A. Rice testifies that he was in the employ of the Oregon Land Company in 1891 and 1892; that the company bought the place about August, 1892, and some time later, in the fall, after Arthur Edwards had harvested the crop, took possession. Then follows other testimony showing that the company improved the property; that it took out some oak trees standing upon this particular parcel, set out prune trees upon a part of it, and cultivated them while it continued in possession and until the time of the assignment. It will be noted that the contract or bond for a deed executed by McIntire to Arthur Edwards stipulated for the execution of a deed on payment of the second installment of the consideration, July 6, 1891, and Arthur agreed to give a mortgage back for the balance of the purchase price, being \$1,200, payable on or before May 1, 1895. It seems that the second installment was paid earlier, viz., on June 8, 1891, and the deed was then given by McIntire, Arthur supposing as he admits, that he was obtaining a conveyance of the entire tract bargained for by the terms of the bond or contract; but there appears to have been a mortgage on the premises executed by McIntire to the school fund commissioners to secure a like sum of \$1,200, and this was permitted by mutual understanding of the parties to remain in the place of the mortgage stipulated for by the bond. In this view, McIntire's contract was in all essential and material respects executed, except for the oversight in misdescribing the premises to be conveyed.

1. Privity of possession between successive adverse holders is requisite to the establishment of continuity, but a verbal contract or agreement is sufficient for the purpose. It need not be by deed or writing: *Shuffleton v. Nelson*, 2 Sawy. 540 (545, Fed. Cas. No. 12,822). Says Mr. Justice LORD, in *Vance v. Wood*, 22 Or. 77, 85 (29 Pac. 73): "But if such successive possessions are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient." See, also, *Rowland v. Williams*, 23 Or. 515 (32 Pac. 402); *Smith v. Chapin*, 31 Conn. 530; *McNeely v. Langan*, 22 Ohio St. 32. The case of *Vance v. Wood* is much like the present. Webster sold to Volle by verbal agreement a certain tract of land, but in executing the deed omitted a portion by mistake. He delivered possession, however, of the whole, and Volle entered claiming title, and the continuity of the adverse holding was upheld through the verbal agreement and the acts of the parties with reference to it.

2. Another principle of law of controlling importance herein is that a person holding realty under an executory contract for its purchase cannot claim to hold adversely to its vendor. If, however, he has paid the full purchase price agreed upon, and has otherwise performed the stipulations of the contract on his part, so that he is entitled to a conveyance, henceforth his possession is adverse, and he can insist upon it whether he has obtained his deed or not: *Anderson v. McCormick*, 18 Or. 301 (22 Pac. 1062); *Ambrose v. Huntington*, 34 Or. 484 (56 Pac. 513). Governed by these settled principles, we may determine this controversy upon the evidence adduced, the controlling features of which have already been adverted to.

3. That McIntire and wife delivered possession to the Edwardses, one or both, some time before the execution of the deed, in pursuance of the stipulation of the bond, and that they entered claiming title to the whole, including the parcel in dispute, there can no longer be any question. Arthur believed that he was obtaining a deed to the whole, and the conclusion is irresistible that he claimed title according to what he supposed he was get-

ting by his deed. Indeed, he says as much, that he took possession out to the road, and claimed to own it. Further, according to his own statement, he gave the Oregon Land Company possession. But notwithstanding this concession he says he especially reserved the tract in dispute when he sold to the company. The subsequent acts of the parties, however, are so at variance with the hypothesis that we think there must be some mistake about it. The Oregon Land Company not only entered into possession upon surrender by Edwards, but improved the property, and exercised acts of ownership over it, as though its right thereto was absolute. From the sale to the Oregon Land Company, in 1892, until recently, Edwards has made no claim whatever to the land. This feature he seeks to explain by the fact, as he asserts, that the contract with McIntire had been lost in the meanwhile, and he did not know his rights therein; that Chambers claimed it, and that he did not know whether he had a better right than Chambers. This does not comport with the idea that he supposed he was obtaining a deed thereto from McIntire, nor with the fact that he gave possession to the Oregon Land Company, and it indicates in reality that he did not know of the mistake in the deed from McIntire until long after the Oregon Land Company purchased and entered into possession. It is urged that the deed by Arthur to the Oregon Land Company purports to convey 149.30 acres, more or less, and therefore that it was not intended to include the controverted parcel; but the bond given by McIntire purported to convey 150 acres, more or less, so that the circumstance is of but little weight. It is also suggested that the Oregon Land Company some time in August, 1897, took a deed from E. J. Chambers, and gave him back a mortgage to secure the sum of \$125, and that these transactions are inconsistent with the theory of an adverse holding in pursuance of another supposed title. The company had a right, however, to buy off a disputed claim if it desired, and the circumstances would not stand in the way of its holding in pursuance of another title. There is absolutely no evidence in the case that Chambers ever had title to the land. Indeed, the course of both parties to the controversy proceeds upon the theory that he never

had title, and that his claim thereto was pretended only. The acts of the parties in taking and giving possession, and in exercising ownership, speak so strongly of a claim of right and title accompanying them that we cannot conclude otherwise than that Arthur, either singly or together with his father, claimed title to the whole McIntire tract, and so continued in such possession under such claim of right until they surrendered to the Oregon Land Company, and from thenceforth to the time of the assignment the company occupied under actual claim of right exclusively and adversely to all persons whomsoever. That the Edwardses intended by the deed of Arthur to convey the whole tract, and primarily so agreed with the Oregon Land Company verbally, we think is clearly shown by the weight of the testimony, thus conjoining his holding with that of the company, with the necessary privity to establish the requisite continuity in the running of the statute. Thenceforth there can be no controversy as to the character of the possession. The holding has been adverse and continued down to and by the plaintiff.

As to the other feature of the case, touching the running of the statute of limitations while the Edwardses were in possession, it might be said that the McIntire bond was not fully executed, but it was so intended by the execution of the deed, and both parties acted upon the supposition that it was in reality so executed. The consideration was fully paid, except \$1,200, and that was allowed to remain because there was a mortgage to the school fund commissioners upon the premises for a like amount at the time, which Arthur concedes he assumed to pay. The fact of the existence of this mortgage was accepted as a fulfilment of the condition that the Edwardses should execute to McIntire a mortgage for such balance, and the contract was to all intents and purposes fully performed on the part of Edwards. Thenceforth he was accountable to the school fund commissioners, and did so account, as Thomas says he made some payments of interest to the school fund for Arthur, and that the last \$600 was paid by the Oregon Land Company about four years ago, it having assumed to pay the same. In any event, Edwards was entitled to a deed July 6, 1891, to the whole tract under the bond, which

he claims stands in the way of the running of the statute of limitations, having paid the second installment of the consideration in full by the tender of the mortgage stipulated for. But this condition was waived, as well as the time of the payment of the second installment, so that Edwards became absolutely entitled to the deed at the time of the payment of such second installment; and the statute of limitations began to run against McIntire as of that date, and has continued without interruption down to the time of the institution of this suit. The statute began to run, therefore, against the McIntire title and all the world on June 8, 1891.

The defendant Arthur Edwards claims title through McIntire by his deed from the heirs and legatees, executed July 18, 1901, which being more than ten years after the statute began to run, they had no title to convey, and Arthur acquired none. The plaintiff is therefore entitled to the relief demanded, and there will be an affirmance of the decree of the court below.

AFFIRMED.

Argued 15 July; decided 4 August, 1902.

MILES v. COLUMBIA PACKERS' ASSOC.

[69 Pac. 827.]

EVIDENCE OF EMPLOYMENT OF PLAINTIFF BY DEFENDANT.

The evidence adduced by plaintiff does not show an employment by defendant or a promise to pay him, and the court properly entered a nonsuit.

From Clatsop: **THOMAS A. McBRIDE**, Judge.

This is an action by Thomas Miles against the Columbia River Packers' Association to recover wages alleged to be due from the defendant. It is averred in the complaint that the defendant is a private corporation, for which plaintiff performed 90 days' labor, at its instance and request, between April 1 and August 10, 1900, in operating a seine, for which it promised and agreed to pay him on the latter date \$2 per day, or the sum of \$180, no part of which has been paid. The complaint also

states eight other causes of action on account of labor performed, the averments in respect thereto being substantially the same as in the first, except as to the amounts claimed by the persons hereinafter named, who assigned to plaintiff their respective demands, as follows: James Hussey, \$216; John Arquette, \$181; George Stuart, \$114; Cusick Arquette, \$115; John Paul, \$55; Sam Downie, \$230; Robert Clunis, \$228; and Sin Sam Wah, \$130. The answer admits that the defendant is a corporation, but denies the other material allegations of the complaint. At the trial plaintiff introduced his testimony and rested, whereupon the court, on defendant's motion, gave a judgment of nonsuit, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Noland* and *Mr. Henry E. McGinn*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Chas. W. Fulton*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by plaintiff's counsel that the testimony shows that their client and his associates were employed by the defendant in pursuance of authority conferred by its general manager upon one Fritz Miller, who for some time had been operating a seine for it; that during the fishing season of 1900 the defendant did many things that led the plaintiff, and those whose claims were assigned to him, to believe that the business in which they were engaged was being conducted for the corporation; that near the close of the season one of its agents, fearing an abandonment of the work, stimulated the hope and held out the inducement that the contracts made in its name by Miller would be carried out; that it paid orders issued by him to several laborers for their work in 1900; that during the preceding year it carried into effect all agreements made by Miller with the men engaged in operating the seine; that acts similar to those which constituted him its agent in 1899 continued him in that relation

during the fishing season of the next year; and that the defendant's immediate and pecuniary interest in the contracts, in pursuance of which the labor was performed, renders its promise to pay therefor not an undertaking to answer for the debts of another, but furnishes an original obligation, which is enforceable by Miller's employes against it, and hence the court erred in granting the nonsuit.

The testimony shows that during the fishing seasons of 1899 and 1900 Fritz Miller operated a seine at the head of Puget Island in the Columbia River, catching and shipping salmon to the defendant, which was engaged in canning them; that in 1899 Miller issued orders on the defendant for the wages of his men, which were promptly paid, but, the value of the fish received being less than the sums so paid, Miller gave the defendant a chattel mortgage on his fishing "gear" to secure the payment of the sums overdrawn, its general manager then assuring him, in referring to the operation of his seine the next year, that "we will see you through," and also saying "that they would back him"; that in 1900 Miller employed the plaintiff and others to assist him, agreeing to pay them \$2 a day; and, having shipped to the defendant about \$6,000 worth of fish, he gave to each of his employes, when quitting his service, an order on the defendant, which, omitting the name of the person to whom issued, the date when given, and the sum for which it was drawn, is as follows:

"Mathew Sands, ———, 1900.

\$——— for labor.

C. R. Packers' Assn.,
Astoria, Or.

Dear Sirs:—

Please pay to ——— \$———, and charge to the account of
Fritz Miller."

The defendant paid all such orders presented prior to July 20, 1900, but refused to pay those issued to the plaintiff and his associates at the close of the fishing season, August 10, 1900. Miller, as plaintiff's witness, being questioned as to what the defendant's general manager said in relation to paying the

claims due for labor, replied: "He never specially mentioned the men, or any particular thing, at any time; never mentioned any particular person at any time." The witness having testified that he was operating the seine for the defendant, an objection was interposed on the ground that he ought not to be permitted to give his conclusions, whereupon the court admonished him to state the facts, obeying which he testified, in substance, as hereinbefore stated.

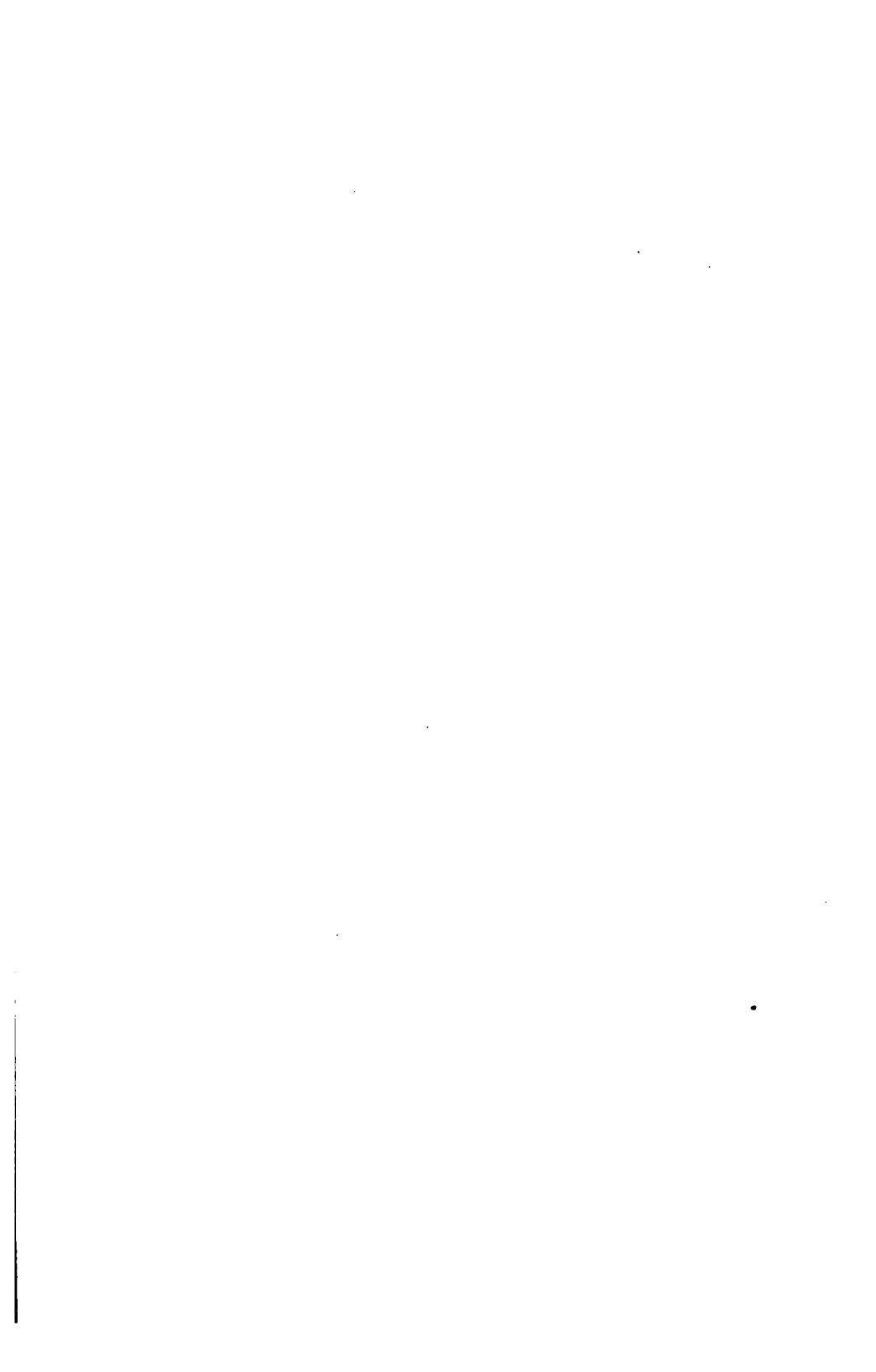
A careful examination of the testimony leads us to conclude that Miller had no express authority from the defendant's general manager to employ laborers to assist him in operating the seine; nor do we think he was conducting the business for the defendant, except that, in consideration of money to be advanced, he agreed to ship to it such salmon as he might catch; for the orders issued by him to his employes conclusively show that his account was to be charged with the sums paid thereon. The plaintiff, appearing as a witness in his own behalf, having testified that on July 20, 1900, he visited one of the defendant's agents, was asked why he did so, and replied: "Fish slackened off a little, and we were only making about expenses, and we got a little uneasy about our money, and we agreed to go down,—send some man down to find out. I got down, and went to the office, and asked Mr. Mattack if this was the Columbia River Packers' Association office, and he said, 'Yes,' and I told him where we were working, and he said, 'All right, keep right ahead.'" The defendant's counsel objected to any testimony in respect to Mattock's declarations until his authority to speak for the defendant had been established, but the court permitted the witness to answer, subject to the condition that, if such authority was not proven, the testimony should be struck out, whereupon he continued: "I wanted to find out about the wages, and he said: 'We are good for the wages. Go back and go to work, and we will pay you the wages when the season is over.'" The testimony, however, fails to show that Mattock possessed authority to bind the defendant by any statements that he might make, even if it be assumed that in an action of this form the defendant could be rendered liable by such a declaration. In 1899 the

defendant having paid all orders drawn on it by Miller, took a mortgage on his "gear" as security for the sums paid in excess of the value of the salmon received; but this fact, and the statement made by its general manager, in referring to the fishing season of 1900, wherein he said, "We will see you through," and that they "would back him," do not seem to have allayed the apprehension of the plaintiff and his associates in respect to securing their wages, for he says that, as they were only making about expenses, "we got a little uneasy about our money." We do not think the testimony shows that Miller was the defendant's agent in operating the seine, even in 1899; for, though all orders drawn by him on the defendant in favor of the laborers were paid by it, the giving of a mortgage to secure such payments shows that he was operating the seine for his own benefit. The contract between the defendant and Miller was an agreement to furnish him money with which to prosecute his business, without stipulating what sum should be advanced for that purpose; and, the defendant's general manager having made no mention of the men to be employed by Miller, his promise to "back him," and to "see him through," was evidently nothing more than an agreement, in consideration of securing the salmon to be caught, to advance on account thereof a reasonable sum of money. There being no ambiguity in the terms "see him through" and "back him," the court was competent to define such clauses, without referring them to the jury, to determine their meaning, or to explain what was thus understood by the parties; and, the relation existing between Miller and the defendant in 1899 being that of debtor and creditor, their course of dealing at that time would not alter the rule.

There was, in our opinion, no competent testimony introduced at the trial tending to render the defendant liable for the wages of the laborers employed by Miller to assist in operating his seine, and, no error having been committed in granting the nonsuit, the judgment is affirmed.

AFFIRMED.

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WHEN ACCOUNTS BECOME STATED—QUESTION FOR THE JUDGE.

1. An account rendered and delivered to the debtor, which exhibits the creditor's demand, becomes an account stated, as between them, unless objected to within a reasonable time; and where the facts are undisputed, the question of what is a reasonable time is for the court.

Nordine v. First National Bank, 386.

EXTENT OF APPLICABILITY OF SUCH RULE—BANKS.

2 The rule as to what constitutes a stated account has now become applicable to almost all classes of debtor and creditor transactions.

Nordine v. First National Bank, 386.

BANKS AND DEPOSITORS—ACCOUNTS STATED.

3. The relation between a bank and its depositors is that of debtor and creditor, and the same rules apply regarding the rendering and stating of accounts as between merchants. *Nordine v. First National Bank*, 386.

EVIDENCE OF STATING AN ACCOUNT.

4. The first time plaintiff's pass book was written up after he opened an account with defendant bank he objected that he had not been credited with certain items. The bank denied that he was entitled to such credits, or any credits not on the book. He continued to deposit with and draw checks on the bank for ten years thereafter. From month to month the bank wrote up and delivered to him the pass book showing the condition of the account, and no objection thereto was made except to the first statement. When their business ceased, the book was written up, showing a small balance to plaintiff's credit, and this statement was not objected to for about six years. *Held*, that plaintiff's receipt and retention of such statements of the account without objecting thereto within a reasonable time constituted an account stated.

Nordine v. First National Bank, 386.

PLEADING A STATED ACCOUNT—AIDED BY VERDICT.

5. Where, in an action against a bank, the answer alleged that from time to time defendant rendered to plaintiff itemized statements of the account, and that he made no objection thereto, but acquiesced therein, and to each and every item thereof, and states the balance shown by such statements, such allegations are sufficient after verdict, as allegations of an account stated.

Nordine v. First National Bank, 386.

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ADVERSE POSSESSION.

PRESCRIPTIVE RIGHT TO WATER.

1. As against riparian owners, one who diverts water may acquire title by prescription in the same time necessary to acquire title to land by adverse possession. *Oregon Construction Co. v. Allen Ditch Co.* 209.

CONTINUITY OF ADVERSE USING OF WATER.

2. There is no interruption of the continuity of holding of persons who divert water because others make a diversion by a canal into which for a while their water flows for a short distance, they again taking up the water and using it in defiance of the others' claims.

Oregon Construction Co. v. Allen Ditch Co. 209.

INTERRUPTION OF ADVERSE HOLDING.

3. Continuity of holding by persons who divert water is not interrupted by objection being made thereto, no attention being made to the objection.

Oregon Construction Co. v. Allen Ditch Co. 209.

ADVERSE HOLDING—PRIVITY OF POSSESSION—EVIDENCE.

4. In establishing adverse possession consisting of successive holdings, privity between the successive holders is necessary, but this may be by oral as well as written contract, if the holdings all refer to one source of claim, and there is actual possession. *West v. Edwards*, 609.

NATURE OF POSSESSION UNDER CONTRACT TO PURCHASE.

5. One in possession of realty under a contract to purchase cannot claim adversely to his vendor until after performance of his part of the agreement; but thereafter his holding is in his own right, without reference to the completion of the contract by the vendor.

West v. Edwards, 609.

ADVERSE POSSESSION—EVIDENCE OF PRIVACY AND CONTINUITY.

6. The owner and occupant of a tract containing one hundred and fifty acres sold and contracted to convey the entire tract. The purchasers went into possession of the whole tract, and received a deed which was supposed to convey all, but which omitted a triangular piece of about nine acres. Thereafter they sold and delivered possession of the whole tract, giving a deed containing the same description as in the deed to them. From such purchaser the title and possession passed through various conveyances to plaintiff, each purchaser holding possession of the entire tract until he passed the possession to his vendee. More than ten years after the first sale, their grantor having died, the first purchasers obtained deeds to such omitted nine acres from all their grantor's heirs, and legatees. *Held*, that defendants' possession of the nine acres was adverse to their grantor from the time they received their first deed, and that there was such privity and continuity of possession between them and the subsequent purchasers, to and including plaintiff, that the title of such original owner and his heirs was lost before such heirs executed deeds to defendants, and they acquired no title or interest in such nine acres by such deeds.

West v. Edwards, 609.

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Tobin v. Portland Mills Co. 269.

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TRESPASS—COMPETENT EVIDENCE OF DAMAGE.

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Oliver v. Hutchinson, 443.

TRESPASSING CATTLE—PARTITION FENCE.

2. Hill's Ann. Laws, § 3445, providing that all fields and inclosures (with a certain exception) shall be fenced, does not apply to exterior fences only; so that a plaintiff, whose lands are fenced in a common inclosure with defendants' lands, cannot recover for trespass of defendants' cattle, not having separated his lands from theirs by a fence, in the absence of malicious prevention by defendants.

Oliver v. Hutchinson, 443.

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1. A decree of interpleader is not severable, so as to permit a defendant to appeal from the part discharging plaintiff from liability, leaving its other provisions undisturbed as to the fund paid into court.

New Zealand Insurance Co. v. Smith, 466.

IDEM—ORDER ON PERSONS NOT PARTIES.

2. An order in an escheat proceeding directing specified persons who are not parties thereto to turn over to a receiver certain property which has been received by them is an appealable order, under Section 535 of Hill's Ann. Laws.

State v. O'Day, 495.

IDEM—DENIAL OF NEW TRIAL.

3. A motion to set aside a verdict and for a new trial based upon insufficiency of evidence, being addressed to the discretion of the trial court, is not assignable as error on appeal; other steps, such as a motion for, nonsuit or for an instructed verdict, being necessary in order to obtain an appealable order upon the sufficiency of evidence.

Crossen v. Oliver, 505.

QUESTIONS NOT RAISED BEFORE THE TRIAL COURT.

4. Subject to the exceptions provided by statute (Hill's Ann. Laws, § 71), litigants will not be permitted to urge on appeal propositions not presented before the trial court. *Trotter v. Stayton*, 77; *State v. Sally*, 366; *United States Mortgage Co. v. Marquam*, 391; *Salem Traction Co. v. Anson*, 562.

APPEAL AND ERROR—CONTINUED.

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5. Statement of counsel on the refusal of the court to allow witness to testify to conversation with H, who made a transfer of property to A, claimed to be fraudulent: "I wish to show that H made certain declarations * * concerning the assignment * * a few days prior to the transfer to A. In this proceeding we are obliged to show the fraudulency of the transaction, and one of the principal things we must prove is that H transferred this stock with fraudulent intent."—sufficiently shows what was expected to be proved by the answer to allow a review of the ruling. *Beers v. Aylsworth*, 251.

NECESSITY OF FILING THE NOTICE IN TIME.

6. Under Laws, 1901, p. 78, § 5, providing that an appeal, if not taken at the time of the rendition of the judgment or decree appealed from, shall be taken by serving and filing the notice of appeal within six months from the entry of judgment, failure to file the notice within that time is fatal to the appeal, though the notice has been served on the opposite party. *Taylor v. Lapham*, 479.

POWER TO EXTEND TIME FOR FILING NOTICE OF APPEAL.

7. Under a statute such as Laws, 1901, p. 78, § 4, providing that where a party gives due notice of an appeal, and thereafter omits, through mistake, to do any other act necessary to perfect the appeal, the judge may permit the performance of such act, does not authorize the judge to permit the filing of the notice of appeal when such notice has not been filed within the time limited by the statute, for the filing is absolutely indispensable to the conferring of jurisdiction. Until the notice is filed there is no appeal to be perfected, and hence nothing that an order can operate on. *Taylor v. Lapham*, 479.

RIGHT OF SURETY COMPANIES TO SIGN APPEAL BONDS.

8. The statute of 1899 authorizing licensed surety companies to become surety on any and every bond by law required (Laws, 1899, p. 195) was not affected by the subsequent act at the same legislative session regulating appeals (Laws, 1891, p. 228), or the act of 1901 (Laws, 1901, p. 77), requiring the notice of appeal to be served on the adverse party. *Small v. Lutz*, 570.

QUESTIONS FOR REVIEW—LIMITATION BY SCOPE OF THE RECORD.

9. Where the bill of exceptions does not contain all the evidence on a certain point it will be presumed that there was sufficient received on that subject to support the verdict. *State v. Colestock*, 9; *United States Mortgage Co. v. Marquam*, 391; *Adkins v. Monmouth*, 296; *Advance Thrasher Co. v. Esteb*, 469.

PART OF EVIDENCE BROUGHT UP—BILL OF EXCEPTIONS.

10. Where it affirmatively appears that the bill of exceptions contains all the testimony applicable to the decision of a point, and all that was considered by the trial judge in his ruling, it is sufficient to secure a consideration by the appellate court, though not all the testimony on other points is before the court. *Goodale Lumber Co. v. Shaw*, 544.

ABANDONED APPEAL—AFFIRMANCE—RULES OF COURT.

11. Under Rule 14 of the supreme court, providing that, if the appellant abandon his appeal, the opposite party, by presenting certain parts of the record to the supreme court, may have the judgment affirmed on motion, a judgment from which an appeal has been taken may be affirmed for abandonment, on motion, where the surety on the undertaking refuses to justify within the required time, and no transcript has been filed in the supreme court. *United States Trust Co. v. Marquam*, 371.

APPEAL AND ERROR—CONTINUED.

DISMISSING APPEAL—DEFECTIVE ABSTRACT.

12. Where an appellant has filed an abstract of the record instead of a transcript, as allowed by Section 541 of Hill's Ann. Laws, as amended by Laws, 1899, pp. 227, 229, and has inadvertently filed a copy of the judgment lien docket, instead of a copy of the judgment order, with the notice of appeal and the undertaking, as required by said section, the appeal should not be dismissed, but the party should be allowed to substitute the proper papers for the one filed by mistake.

Byers v. Ferguson, 77.

DISMISSING APPEAL—DEFECTIVE NOTICE.

13. A notice of appeal, reciting the judgment as rendered June 18, whereas it was actually rendered June 8, was not ground for dismissing the appeal, where it was manifest from the appeal papers that there was a mere clerical error, and no injury. *Salem Traction Co. v. Anson*, 562.

PRESUMPTION OF CORRECTNESS OF RULING OF TRIAL COURT.

14. Where the bill of exceptions does not purport to contain all the evidence, the appellate court will presume that the trial court acted correctly. *State v. Colestock*, 9; *Adkins v. Monmouth*, 266; *United States Mort. Co. v. Marquam*, 391; *Advance Thresher Co. v. Esteb*, 469.

DISCRETION OF TRIAL COURT.

15. Where the trial court has exercised a judicial discretion, as, in referring a case because long accounts are involved, or in allowing a party to intervene after a long delay, the conclusion will not ordinarily be disturbed on appeal.

Willard v. Bullen, 25; *Salem Traction Co. v. Anson*, 562.

HARMLESS ERROR—FAVORABLE RULING.

16. Error in favor of an appellant cannot be the basis of complaint, for it is manifestly harmless. *State v. Kelly*, 20; *State v. Sally*, 366.

HARMLESS ERROR—SHOWING MATTERS OF COMMON KNOWLEDGE.

17. In an action for injuries to a horse and vehicle, it was not error to permit proof of the amount of the repairs to the vehicle and harness, without showing that the amount was reasonable, where such amount was small, and concerned matters of common knowledge.

Chapron v. Portland Electric Co. 39.

HARMLESS ERROR—IMMATERIAL AFFIDAVITS.

18. In a suit by the depositors of wheat in a warehouse to compel an accounting for wheat delivered by the warehouseman to defendants, without the consent of the depositors, the admission of affidavits of the depositors as to the deposit, amount, and authority to remove or dispose of the wheat, made on *ex parte* examinations and without opportunity to defendants to cross-examine, is harmless where a comparison of the findings of the court, based on other evidence in respect to the quantity of wheat due the several depositors and the warehouseman's ledger showing only about thirteen bushels of wheat unaccounted for out of several thousand bushels, shows that no material injury resulted from the admission of the affidavits.

Tobin v. Portland Mills Co. 269.

HARMLESS ERROR—WITHDRAWING IMPROPER EVIDENCE.

19. Error in admitting evidence is generally cured by directing the jury to disregard it; but the instruction must make clear the evidence referred to.

State v. Aiken, 294.

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HARMLESS ERROR—CURATIVE EFFECT OF SUBSEQUENT EVIDENCE.

20. Where, in an action for conversion of stock of a bank, plaintiff offered no testimony in his case in chief as to the value of the stock, and a nonsuit was denied, but on appeal it appeared that the bank was a going one, so that the stock must have had some value, and it appeared from the opinion of the trial court, made a part of the bill of exceptions, that much testimony was taken as to the value of the stock, any error in refusing the nonsuit will be regarded as cured.

Weinhard v. Commercial National Bank, 359.

HARMLESS ERROR IN ADMITTING EVIDENCE.

21. Error in admitting testimony as to marks on a stolen article is harmless where the thing itself is before the jury. *State v. Sally*, 366.

CONCLUSIVENESS OF FINDINGS ON APPEAL.

22. In deciding an equity case it is the duty of the Supreme Court of Oregon, under Section 543 of Hill's Ann. Laws, to reach its conclusions by original investigation, and the findings of the trial court are only advisory, though they may be persuasive.

Larch Mountain Investment Co. v. Garbade, 123.

DISPOSITION OF EQUITY CASE ON REVERSAL.

23. Where, in an equitable suit, defendants did not introduce evidence because the court excluded competent evidence offered by plaintiff, the cause will be remanded, on appeal, instead of entering final judgment for plaintiff.

Robson v. Hamilton, 239.

AMENDING PLEADINGS AFTER REVERSAL.

24. Where a judgment is reversed because based on a finding of fact outside the issues, the question as to whether the parties shall be allowed to amend must, in the first instance, be determined by the trial court, in the exercise of judicial discretion.

Male v. Schaut, 425.

SUBSEQUENT APPEAL—EFFECT OF FORMER DECISION.

25. An appellate court will not on a second or subsequent appeal revise or reverse its former decisions in a given cause where the facts remain the same.

Stager v. Troy Laundry Co. 141.

PRESUMED VERITY OF RECORD.

26. An objection on appeal that the trial court erred in entering a decree without proof any of the material issues in the case will not be heard when the findings recite that they are based on "the admission of the pleadings and the evidence taken." for the record imports verity and precludes dispute.

Martin v. Eagle Development Co. 448.

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ATTACHMENT.

RETURN OF SERVICE—NAME OF OCCUPANT.

1. The validity of an attachment, under Hill's Ann. Laws, § 149, subd. 1. does not depend upon the accuracy of the recital therein of the name of the occupant of the land levied on; thus, where the return on a writ of attachment recites a levy on land, and the service by the sheriff of a copy of the writ on a Chinaman, who was the sole occupant, and whose name is unknown to the sheriff, its failure to give the name of the Chinaman does not render void a judgment ordering a sale of the property.

White v. Ladd, 324.

PRESUMPTION OF VALIDITY OF ATTACHMENT PROCEEDINGS.

2. Every intendment of the law favors the sufficiency of an attachment proceeding, where the writ was issued from a court of general jurisdiction, unless the writ affirmatively shows a want of jurisdiction.

White v. Ladd, 324.

ATTACHMENT AND JUDGMENT—RES JUDICATA.

3. Where, in a suit begun by attachment, the defendant died before service of summons, and service was thereupon had upon his executor, the jurisdiction of the court depended upon the validity of the attachment, and the judgment ordering the sale was, therefore, not conclusive as to the validity of the seizure of part of the property, merely because the remainder was well attached; but the question of such validity could be raised on motion to confirm the sale.

White v. Ladd, 324.

ADJUDICATION OF SUFFICIENCY OF ATTACHMENT BY THE JUDGMENT.

4. Where the question of the sufficiency of the service of an attachment to give jurisdiction over the property seized is raised in an amended complaint, and not controverted, the judgment ordering the sale of the property is conclusive, and the question cannot be raised on objection to the confirmation of the sale.

White v. Ladd, 324.

ADJUDICATION BY MOTION OF VALIDITY OF ATTACHMENT

5. Where the sufficiency of the service of an attachment to give jurisdiction to order the sale of the attached property was necessarily involved and passed upon in the determination of two motions to dismiss the attachment, and such determination has been affirmed on appeal, the question cannot be again raised on objection to the confirmation of the sale of the attached property.

White v. Ladd, 324.

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BANKS AND BANKING.**NATIONAL BANKS—ASSESSMENT TO RESTORE IMPAIRED CAPITAL.**

1. Under Section 5205, Rev. Stat. U. S. providing that every national banking association, whose capital stock shall have been become impaired, shall, after receiving notice thereof from the comptroller of the currency, pay the deficiency by a *pro rata* assessment upon the shareholders, and that if any such association shall fail to pay up its capital stock or go into liquidation, a receiver may be appointed to close up its affairs, the right to determine the course that shall be pursued rests with the shareholders, and cannot be exercised by the directors.

Weinhard v. Commercial National Bank, 359.

BANKS AND BANKING—CONCLUDED.**APPLICABILITY OF STATED ACCOUNT RULE TO BANKS.**

2. The relation between a bank and its depositors is that of debtor and creditor, and the same rules apply regarding the rendering and stating of accounts as between merchants. *Nodine v. First National Bank*, 386.

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BILLS AND NOTES.**IMPLIED WARRANTY UPON INDORSEMENT OF NOTE WITHOUT RECOURSE.**

1. The indorsement of a promissory note without recourse carries an implied warranty by the seller that it and the previous indorsements on it are genuine, and is intended, like a delivery, to carry title, but such an indorsement is not a contract. *Carroll v. Nodine*, 412.

PAROL EVIDENCE—INDORSEMENT WITHOUT RECOURSE.

2. An unqualified indorsement of negotiable paper is a written contract excluding parol evidence to vary its terms, while an indorsement without recourse is not a contract, but merely operates to transfer the title; and hence parol evidence is admissible to show that at the time of the transfer of a note by indorsement without recourse the buyer agreed to take the paper at his own risk, absolutely relieving the indorser even from the implied warranty of genuineness attending such a transfer.

Carroll v. Nodine, 412.

SUFFICIENCY OF NOTICE TO INDORSEE AS INDEMNITOR.

3. The purchaser of a note sued the maker, who defended on the ground that an indorsement of payment appearing on the note was not genuine, and that without this payment the note was barred by limitation. The seller of the note, who had indorsed without recourse, agreed at the time of the sale to appear as a witness for the purchaser in case he sued on the note, and did so appear, though notified of the pendency of the suit only a few hours before taking the witness stand. She was not asked to assume or assist in the defense. *Held*, that the notice was nevertheless sufficient to make the judgment in the suit binding on her.

Carroll v. Nodine, 412.

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MATERIALITY OF SUBSEQUENT SURVEYS.

1. In determining ancient boundaries the rule is to follow as closely as may be the lines of the original survey, and subsequent surveys not intended to fix on the ground the location of such lines are irrelevant.

Trotter v. Stayton, 117.

UNASCERTAINED LINES—SETTLEMENT BY AGREEMENT.

2. Where the boundary line between adjoining proprietors is unascertained, and they agree on a division line, and take possession accordingly, and acquiesce therein, the line so agreed on is binding on the parties and their privies, and one of such owners, or his successor in interest, is entitled to a reformation of his deed so as to make the agreed line the boundary of his land.

Thicssen v. Worthington, 145.

RIPARIAN BOUNDARY ON MEANDERED STREAM.

3. Where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner.

Johnson v. Tomlinson, 198.

BURDEN OF PROOF. See EVIDENCE, 5, 6.

CARNAL KNOWLEDGE.

Degree of Resistance Required of Prosecutrix. See CRIM. LAW, 12.

Circumstantial Evidence of Penetration. See CRIM. LAW, 13.

CARRIERS.

DUTY TO UNLOAD AND CARE FOR GOODS AT DESTINATION.

1. It is the duty of a common carrier usually to unload goods at their destination with due care, and put them in a reasonably safe place, and whether this has been done in a given case is a question of fact: for example, whether a carrier has discharged its duty to the shipper when it has unloaded a mule onto a wharf, and tied it to a small, light plow, painted a vermilion red, is a question that should be submitted to the jury.

Normile v. Oregon Navigation Co. 177.

ASSUMING TO UNLOAD—LIABILITY FOR NEGLIGENCE.

2. Notwithstanding a stipulation that the shipper shall unload his property at destination, if the carrier voluntarily does so without notice to the shipper, it is liable for negligence therein.

Normile v. Oregon Navigation Co. 177.

EXEMPTION OF CARRIER FROM LIABILITY FOR INJURY TO GOODS.

3. A common carrier cannot at all limit its liability for loss of or injury to property entrusted to it for carriage caused by its own negligence or that of its servants or agents.

Normile v. Oregon Navigation Co. 177.

VALIDITY OF CONTRACT AS TO VALUE OF LIVE STOCK.

4. A contract of shipment of live stock, providing that the stipulated tariff is less than that for transportation at carrier's risk, and is given in part consideration of shipper's agreement to limitation of carrier's liability, and it is agreed the value of the stock does not exceed a stated sum, does not make a partial exemption from liability for negligence, but a valid valuation; it not being shown that it was not entered into freely by the shipper, or whether he could have obtained other terms on a higher valuation.

Normile v. Oregon Navigation Co. 177.

CARRIERS—CONTINUED.

LIABILITY FOR NEGLECT OF CONNECTING CARRIER—BILL OF LADING.

5. A contract of shipment of goods consigned to New York was made upon the carrier's printed form of bill of lading, containing a blank space for the place of destination, with directions not to insert points not on the carrier's lines. The blank was not filled. The written part of the contract provided for "fastest passenger train service, consigned as above." A stipulation relieved the carrier from liability for loss or injury to the property, except on its own lines. *Held*, that the blank space for the destination of the goods was reserved for points on carrier's own lines, and that the written part of the contract was a designation of the destination with a contract as to the kind of service to be furnished to the termination of the line of the contracting company, subject to the stipulation as to liability beyond its own line; and therefore the contracting carrier was not liable for loss or damage on lines beyond its own.

Taffe v. Oregon Railroad Co. 64.

RELATION OF CARRIER TO PASSENGER—PAYMENT OF FARE.

6. The payment of a consideration or the possession of a ticket or pass is not necessary to the creation of the relationship of passenger and carrier, so far as relates to an injury received by one who is on a train.

Simmons v. Oregon Railroad Co. 151.

LIABILITY FOR INJURY RECEIVED ON SPECIAL FREIGHT.

7. Where a railroad company allows passengers to ride on regular freight trains, but not on "extras," and a person in good faith boards a train in fact an "extra," but in all appearances similar to a regular freight, and is allowed by the conductor to ride thereon, he is to be regarded as a passenger to whom the company is liable as a carrier for injuries received while on such train.

Simmons v. Oregon Railroad Co. 151.

APPARENT AUTHORITY OF CONDUCTOR OF A SPECIAL FREIGHT.

8. Where a carrier is in the habit of carrying passengers on its freight trains under certain conditions and restrictions, a conductor of such a train is acting within the limit of his apparent authority when he permits a person to board the train and ride thereon, though he really violates the rules in so doing, and the carrier will be liable to such a person, as a passenger, for an injury resulting from the negligence of the train operatives.

Simmons v. Oregon Railroad Co. 151.

LIABILITY FOR INJURY TO EMPLOYEE TRAVELING WHILE NOT ON DUTY.

9. An employee of a carrier traveling free because of his employment, either with or without a pass, when his time is his own, and he is occupied with his private business, is a passenger, and entitled to recover for damages caused by the negligence of the carrier's servants; under such circumstances the traveler is not a fellow servant with the careless employees.

Simmons v. Oregon Railroad Co. 151.

DUTY TO STOP AT SAFE PLACE.

10. A carrier owes a passenger the duty of stopping its train at a place where he can, in the exercise of reasonable care, alight with safety; and it is not enough to stop at a place not suitable for him to alight, but convenient for its employees to do their work.

Simmons v. Oregon Railroad Co. 151.

LIMITED LIABILITY CONTRACT TO CARRY PASSENGERS.

11. A railroad company which voluntarily designates freight trains to carry passengers, and permits its agents to sell tickets therefor to passengers generally, is a common carrier of passengers by the means so adopted, and its agreement with a passenger, whereby he absolves the company from all liability while riding on such freight trains in consideration of his securing his ticket at a reduced rate, is against public policy and void.

Richmond v. Southern Pacific Co. 54.

CARRIERS—CONCLUDED.

COMMON-LAW AND CONTRACT LIABILITY—VARIANCE.

12. There is a fatal variance between a claim against a common carrier on its common-law liability and proof of a contract of carriage limiting the liability for loss. *Normile v. Oregon Navigation Co.* 171.

ALLEGING ONE DUTY AND RECOVERING ON ANOTHER.

13. Proofs must follow and support the allegations of the pleadings—a plaintiff will not be permitted to sue defendant for a violation of its duty as a common carrier, and recover for some neglect of its duty as a warehouseman, for example. *Normile v. Oregon Navigation Co.* 177.

MATERIAL AND IMMATERIAL EVIDENCE.

14. Testimony of the conductor of a train on which a passenger was injured that he thought such passenger had alighted is immaterial; it appearing that he would not have done differently if he had known he was aboard, and that the accident occurred through failure of the engineer to obey signals. *Simmons v. Oregon Railroad Co.* 151.

CASES FROM THE OREGON REPORTS Cited, Criticised, Distinguished, and Overruled in This Volume. Same as OREGON CASES.

CATTLE.

Damages by Grazing—Necessity of Partition Fence. See ANIMALS, 3.

CERTIFICATE OF PROBABLE CAUSE.

Practice—Necessity of Bill of Exceptions—Nature of Right Vested in a Justice to Grant a Certificate. See CRIMINAL LAW, 1, 2.

CHARGING JURY.

Duplicate Instructions May Properly be Refused. See TRIAL, 9.
Need of Asking Judge for Special Instructions. See TRIAL, 10.
Charge Should Relate to the Entire Evidence. See TRIAL, 11.

CHARTERS OF CITIES.

Philomath, 1899, Sec. 80, *Philomath v. Ingle*, 292.
Portland, 1898, Sec. 53, *Bank of Columbia v. Portland*, 1, 8.
Sec. 117, *Gaston v. Portland*, 373, 377.
Sec. 127, *Bank of Columbia v. Portland*, 1, 4.
Sec. 128, *Bank of Columbia v. Portland*, 1, 6.
Sec. 156, *Oregon Real Estate Co. v. Gambell*, 61, 63.

CHATTLES.

Statements of Possessor of as to His Ownership. See EVIDENCE, 13.
Registering Ownership of by Married Women. See HUSBAND AND WIFE.

CIRCUIT COURTS.

Appeal From Justice's Court—Trial. See JUSTICES OF THE PEACE, 1.

CIRCUMSTANTIAL EVIDENCE.

Rape—Evidence Sufficiently Showing Penetration. See CRIM. LAW, 13.
CITIES. Same as MUNICIPAL CORPORATIONS.

CITY CHARTERS. Same as CHARTERS OF CITIES.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLASS LEGISLATION. See CONSTITUTIONAL LAW, 1.

CODE CITATIONS. Same as STATUTES OF OREGON.

COLLATERAL ATTACK.

Orders of County Court Determining Heirship are Conclusive as Against Escheat Proceeding. See JUDGMENT, 7.
Proceedings of Probate Court in Ordering Sale or Mortgage of the Land of Estates. See EXECUTORS AND ADMINISTRATORS, 4.

COLLATERAL DEPOSIT.

Nature of Deposit of Corporate Stock. See **CORPORATIONS**, 1.
Foreclosure of Lien on Pledged Collateral. See **CORPORATIONS**, 3.

COMMERCIAL PAPER. Same as **BILLS AND NOTES**.

COMMON CARRIERS. Same as **CARRIERS**.

COMPULSORY REFERENCE. Same as **REFERENCE**.

CONSECUTIVE PUBLICATION. See **NOTICE**.

CONSPIRACY.

Showing Manner and Appearance of Alleged Confederate Soon After the Time of the Offense. See **CRIMINAL LAW**, 20.
Declarations of Conspirators Subsequently Made. See **CRIM. LAW**, 21.

CONSTITUTIONAL LAW.

BARBERS' SUNDAY LAW NOT CLASS LEGISLATION.

1. A law prohibiting the practicing of a particular trade on Sunday, such as barbering (Laws, 1901, p. 17), is not class legislation, though there is no general Sunday law. *Ex parte Northrup*, 489.

DEPRIVATION OF LIBERTY AND PROPERTY.

2. A law making it a misdemeanor to do barbering on Sunday, such as Laws, 1901, p. 17, does not deprive any one of liberty or property without due process of law, as prohibited by Const. U. S. Amend. XIV.
Ex parte Northrup, 489.

DEPRIVATION OF EQUAL RIGHTS.

3. A law making it a misdemeanor to do barbering on Sunday, such as Laws, 1901, p. 17, does not encroach on the equal rights which are declared by Const. Or. Art. I, § 1, to belong to all citizens; but it is a reasonable exercise of the police power, based on an apparent natural distinction. *Ex parte Northrup*, 489.

DELEGATION OF LEGISLATIVE FUNCTIONS.

4. The power to appoint to a public office is often exercised by legislative bodies, but it is not a constitutional power that cannot be delegated, like the power to make laws, and an act creating a board with power to appoint certain officers and agents is not void because it attempts to delegate constitutional powers; for example, the law of 1901, regulating the fish industry of the state and creating a Board of Fish Commissioners, is not unconstitutional, as being a delegation of legislative powers, in authorizing the commissioners to appoint a master fish warden.

Reed v. Dunbar, 509.

See, also, **STATUTES**.

CONSTITUTION OF OREGON.

Article I, Sec. 1.	<i>Ex parte Northrup</i> , 489.
Article IV, Sec. 20.	<i>Lawrey v. Sterling</i> , 518, 520.
Sec. 23, Subd. 2,	<i>Ex parte Northrup</i> , 489, 490.
Article VII, Sec. 12,	<i>Lawrey v. Sterling</i> , 527.
Article VIII, Sec. 5,	<i>Lawrey v. Sterling</i> , 527.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV, *Ex parte Northrup*, 489, 492.

CONTRACTS.

INDORSEMENT OF A NOTE WITHOUT RECOURSE IS NOT A CONTRACT.

1. The indorsement of a promissory note without recourse is intended, like a delivery, to carry title, but such an indorsement is not a contract.
Carroll v. Nodine, 412.

CONTRACTS—CONCLUDED.

UNQUALIFIED INDORSEMENT OF A NOTE IS A CONTRACT.

2. An unqualified indorsement of a negotiable paper is a written contract, in the sense that no unexpressed and unimplied warranties or agreements concerning the indorsement can be shown by parol.

Carroll v. Nodine, 412.

CONTRIBUTORY NEGLIGENCE.

Pleading—Necessity of Alleging Lack of Contributory Negligence in the Complaint. See NEGLIGENCE. 5.

CONVERSION. Same as TROVER AND CONVERSION.

CORPORATIONS.

NATURE OF COLLATERAL DEPOSIT OF CORPORATE STOCK.

1. An assignment and delivery of shares of corporate stock by a debtor as security for a debt is usually a pledge, and the instrument here under consideration is a pledge, not a mortgage.

Irving Park Association v. Watson, 95.

RIGHT OF STOCKHOLDER TO CONTRIBUTION—EQUITY.

2. A pledgor of a certificate of stock to the corporation by which it was issued, as a security for the unpaid subscription therefor, cannot, when sued for the foreclosure of the pledge, require the balance of the stockholders to be made parties and to contribute to the indebtedness of the company, for the right of the corporation against the pledgor is quite independent of the rights that may exist between stockholders themselves.

Irving Park Association v. Watson, 95.

FORECLOSURE OF PLEDGE—DEFENSES.

3. Such a pledgor cannot defend by showing that the corporation was organized to purchase land, for which it was supposed that it paid a certain sum, but in fact paid less, as some of the stockholders received commissions and rebates from the owner of the land, for which they ought to account, the matter being wholly between the corporation and such stockholders.

Irving Park Association v. Watson, 95.

COMPENSATION OF OFFICERS FOR EXTRA SERVICES.

4. Where the duties of an officer of a corporation are merely nominal, he is entitled to compensation for other services having no connection therewith, which he performs for the corporation.

Baines v. Coos Bay Navigation Co. 135.

PRESUMED KNOWLEDGE OF STOCKHOLDERS—ESTOPPEL.

5. Plaintiffs were stockholders in a corporation, and had a claim on certain property of the corporation which they had sold to it. The corporation mortgaged the property, the mortgagee having notice of plaintiffs' claim. *Held*, that in the absence of any showing that plaintiffs were present at the stockholders' meeting where the mortgage was authorized, or actually consented thereto, the mere fact that they were stockholders did not estop them from asserting their rights under the contract.

Martin v. Eagle Development Co. 448.

CORPORATIONS—CONCLUDED.

PROOF OF CORPORATE EXISTENCE—COMPLIANCE WITH STATUTE.

6. A substantial compliance with all the requirements of the statutes is a necessary part of the creation of a corporation, and such compliance must be shown as part of the proof of corporate existence. In Oregon, for instance, under Sections 3217-3225 of Hill's Ann. Laws, the testimony of a subscribing witness to a writing purporting to be articles of incorporation that he was present, and saw the persons named therein as incorporators execute it, the offering of the paper in evidence and the testimony of one of the alleged incorporators that he is president of such corporation, unsupplemented by any evidence of the filing of the articles, the subscription of one-half of the stock, or the election of a board of directors, is insufficient to establish the existence of the corporation.

Goodale Lumber Co. v. Shaw, 544.

COSTS AND DISBURSEMENTS.

RIGHT TO RECOVER MILEAGE PAID TO SHERIFF.

1. Under Laws, 1899, p. 66, requiring the sheriff to collect in advance his fees in a civil case, and to pay them to the county treasurer, and providing that the judgment shall include, as costs, the amounts so paid by the prevailing party to the sheriff, there is no error in approving taxation of costs taxing the sheriff's fees to defendant, against whom judgment was rendered, no question being raised whether the fees were paid to the county treasurer or retained by the sheriff.

Spencer v. Peterson, 257.

NECESSITY OF STATING MATERIALITY OF TESTIMONY OF WITNESS.

2. An amended verified statement as to costs, filed under Section 537 of Hill's Ann. Laws, as amended by Laws, 1901, p. 114, need not state that the testimony of a witness was material, it is sufficient to show that he attended the trial as a witness at the party's request and testified; having been heard, it will be presumed that he was a material witness.

Spencer v. Peterson, 257.

WITNESSES' FEES—OBJECTION—AMENDED VERIFIED CLAIM.

3. Where objection is made to a claim for the fees of a witness who has voluntarily attended the trial from a distance of more than twenty miles, the claimant must file an amended verified statement showing the facts as to the materiality of the testimony, the necessity for an oral examination, the fact of voluntary attendance, and the distance traveled.

Spencer v. Peterson, 257.

SUFFICIENCY OF OBJECTION TO WITNESSES' FEES.

4. Objections to items of costs, under Section 536 of Hill's Ann. Laws, should be certain enough to inform the claimant in what particulars the specified items are not authorized or are unreasonable. For example, an objection to the taxation of mileage for a witness because he voluntarily attended from outside the county without an order of the court does not raise the question that the oral examination of such witness was unnecessary, nor require the prevailing party to make affidavit of such fact, though such affidavit would be necessary, under section 795, to obtain an order for his attendance.

Spencer v. Peterson, 257.

AMOUNT IN DISPUTE.

5. Under Hill's Ann. Laws, § 549, subd. 5, allowing plaintiff costs in actions not elsewhere classified when he shall recover fifty dollars or more, and section 551, allowing costs to defendant unless plaintiff be entitled to them, a recovery of less than fifty dollars in an action included in subdivision 5 of section 549 does not carry costs, but defendant is entitled to costs against plaintiff.

United States Mortgage Co. v. Willis, 481.

COTENANCY in Wheat in Warehouse. See TENANTS IN COMMON.

COUNTERCLAIM. Same as SET-OFF AND COUNTERCLAIM.

COUNTY ROADS. Same as HIGHWAYS.

COURTS.

POWER OF COURTS TO VACATE VOID JUDGMENTS.

1. A court rendering a judgment void on its face has the inherent power, even on its own motion, to set the judgment aside at any time.

White v. Ladd, 324.

DUTY OF SUPREME COURT IN DECIDING EQUITY CASES.

2. In deciding an equity case it is the duty of the Supreme Court of Oregon, under Section 543 of Hill's Ann. Laws, to reach its conclusions by original investigation, and the findings of the trial court are only advisory, though they may be persuasive.

Larch Mountain Investment Co. v. Garbade, 123.

EFFECT OF ESCHEAT SUIT ON PROBATE PROCEEDING.

3. Construing Section 895 of Hill's Ann. Laws, with sections 1183, 1191, 3099, and 3155 *et seq.*, it is reasonably apparent that the beginning of an escheat proceeding in a circuit court, as provided by section 3136, was not intended to interfere with or to interrupt the usual proceedings in the county court in a given estate, or to affect the jurisdiction of that court in any way.

State v. O'Day, 495.

CRIMINAL LAW.

CERTIFICATE OF PROBABLE CAUSE—NECESSITY OF BILL OF EXCEPTIONS.

1. Before a justice of the supreme court can undertake to certify that there is probable cause for an appeal from a judgment in a criminal case, under Section 1440 of Hill's Ann. Laws, the bill of exceptions must have been settled by the trial judge.

Ex parte Warren, 309.

NATURE OF RIGHT TO GRANT CERTIFICATE OF PROBABLE CAUSE.

2. The granting or refusal of a certificate of probable cause by a justice of the supreme court is in no sense revisory of the action of the lower court in refusing a certificate, or declining to grant a stay of execution: nor is a justice of the supreme court given by the statutes revisory power over the process of a trial court in refusing a stay of execution in a criminal case, pending the settlement of the bill of exceptions, in the absence of an abuse of discretion.

Ex parte Warren, 309.

INFORMATION—ACTS CONSTITUTING THE OFFENSE.

3. Within the meaning and fair construction of Hill's Ann. Laws, § 1268, subd. 2, requiring informations and indictments to state the acts constituting the offense in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended, an information giving the date and place of the alleged offense, and stating that accused "did then and there unlawfully and feloniously assault one L with a dangerous weapon, with intent to kill" him, sufficiently states the facts, and does not state merely a conclusion of law.

State v. Kelly, 20.

INFORMATION ALLEGING GUILTY KNOWLEDGE.

4. In prosecutions for distinctly statutory offenses, where the statute does not make guilty knowledge an element, it is unnecessary to show an intent to violate the law, and that defendant acted in good faith on mistaken information is not a defense.

State v. Gully, 318.

CRIMINAL LAW—CONTINUED.

ASSAULT WITH INTENT TO KILL—ALLEGING INTENT.

5. In an information charging an assault with intent to kill it is not necessary in Oregon to allege that the act was purposely and maliciously done, or that it was done with premeditation or with malice aforethought, whatever the rule may be elsewhere. *State v. Kelly*, 20.

ALLEGATION OF VENUE.

6. Where an information for assault with intent to kill charged that accused on a certain date, in a certain county, "then and there being armed with a dangerous weapon, did then and there feloniously assault one L with such dangerous weapon," is sufficiently definite in its allegations of time and place, for the phrase "then and there being armed" refers quite clearly to the date of the offense, and not to the date of the information. *State v. Kelly*, 20.

SELLING LIQUORS UNLAWFULLY—GUILTY INTENT.

7. Under Hill's Ann. Laws, § 1913, providing that if any person shall sell liquor to any minor he shall be guilty of a misdemeanor, and punished, etc., a sale to a minor is an offense within the statute, though the seller honestly believed, after inquiry of the minor, that he was an adult. *State v. Gulley*, 318.

INTOXICATING LIQUORS—IMPLIED AMENDMENT OF STATUTE.

8. Act February 20, 1891 (Laws, 1891, p. 79), enacting that if any minor over the age of sixteen shall, for the purpose of inducing any person to give or sell him intoxicating liquor, represent that he is twenty-one years of age, he shall be punished, does not impliedly modify or affect section 1913, making it a misdemeanor to sell liquor to minors.

State v. Gulley, 318.

INDICTMENT FOR RESCUE—ALLEGATION OF INTENT TO ESCAPE.

9. An information under Section 1833 of Hill's Ann. Laws for aiding a prisoner to escape contains a sufficient allegation of intent when it alleges that defendant "did willfully, unlawfully, and feloniously assist * * in an attempt to escape" from a county jail, for it alleges co-operation in an actual effort to escape, which could not have existed without the intent by the prisoner to escape. *State v. Daly*, 515.

INDICTMENT—CHARGING GUILT OF PRISONER.

10. An information for aiding a prisoner in an intent to escape need not allege the facts showing the prisoner's guilt; it will be sufficient to state that the prisoner was lawfully detained in the stated place of confinement.

State v. Daly, 515.

CONVICTION OF OFFENSE INCLUDED IN CHARGE.

11. Where defendant, in a prosecution upon an information charging assault with a dangerous weapon with intent to kill, admitted the assault, and sought to justify his act on the ground of self-defense, the jury are not restricted to a verdict of guilty as charged or not guilty, but may find defendant guilty of an assault with a dangerous weapon, without intent to kill. *State v. Kelly*, 20.

RAPE—RESISTANCE REQUIRED OF PROSECUTRIX.

12. It is not necessary that the person assaulted should have resisted to the uttermost of her ability to support a charge of rape—it is enough if the act was accomplished by force, without consent, and against a genuine resistance. *State v. Colestock*, 9.

CRIMINAL LAW—CONTINUED.

RAPE—DEDUCTION FROM CIRCUMSTANTIAL EVIDENCE.

13. In a prosecution for rape by carnally knowing a female under the age of consent (Hill's Ann. Laws, § 1733; Laws, 1895, p. 67), where the evidence showed that the defendant for weeks occupied with the female in question, she being a prostitute, a room with only one bed, the jury might reasonably infer that there had been during that time a sufficient penetration to consummate the crime charged. *State v. Welch*, 35.

LARCENY—INSTRUCTION DISTINGUISHING OFFENSES.

14. Defendant being on trial for horse stealing, under Section 1766 of Hill's Ann. Laws, and it appearing that after getting possession of the horse defendant changed the brand, which is an independent offense under Section 1769 of Hill's Ann. Laws, it is error not to instruct the jury, when requested to do so, that if the animal was taken without an intention to steal it, the subsequent alteration of the brand was immaterial; since the two acts are distinct, and the jury may quite possibly have understood that the changing of the brand would justify a conviction for stealing.

State v. Howard, 50.

SUCH INSTRUCTION SHOULD BE DEFINITE.

15. The refusal to give such instruction was not cured by giving an instruction that, if the horse was taken in good faith, with the intention of returning it to its owner, a subsequently conceived intention to wrongfully convert it would not constitute larceny. *State v. Howard*, 50.

LARCENY—POSSESSION WITH OWNER'S CONSENT—INTENT.

16. Where the theory of the defense on prosecution for larceny was that defendant took the animal under the belief that it belonged to his father, and that he had authority to take it, an instruction that "the intent to convert the animal to his own use, knowing it was not his, is the gist of this offense," was not prejudicially erroneous, in connection with the preceding instruction defining larceny as the felonious taking, stealing, and carrying away of the property of another, and an instruction following, exonerating defendant if the jury believed the theory of defense.

State v. Sally, 366.

IDEM—LARCENY—INTENT OF OBTAINING POSSESSION.

17. That one accused of larceny has secured possession of the property with the owner's consent is not conclusive of his innocence, but the question of his guilt will depend on the intent with which the possession was so secured, which is a matter of fact. *State v. Meldrum*, 380.

PRESUMPTION FROM POSSESSION OF STOLEN PROPERTY.

18. The presumption arising from the possession of stolen property is one of fact only. *State v. Sally*, 366.

INSTRUCTION AS TO EFFECT OF HAVING STOLEN PROPERTY.

19. Where the defense for larceny of a steer was that defendant took it believing it to be the property of his father, an instruction that, while possession of property recently stolen, if unexplained, is a circumstance tending to show guilt, yet if the jury believed that defendant came honestly in possession, or that it was unconnected with any suspicious circumstance of guilt, this would remove every presumption of guilt, was as favorable as defendant was entitled to; and it was not error to refuse an instruction that, if the possession was reasonably and credibly explained, the presumption of guilt arising therefrom was overcome.

State v. Sally, 366.

CRIMINAL LAW—CONTINUED.

EVIDENCE—CONSPIRACY—PERSONAL APPEARANCE OF CONFEDERATE.

20. Where there is evidence in a criminal case tending to show a conspiracy between defendant and another to commit the crime charged, and that they were both present when the crime was committed, evidence of the physical appearance of defendant's alleged confederate soon after the homicide was admissible.

State v. Aiken, 294.

EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR SUBSEQUENTLY MADE.

21. Statements made by one of several conspirators—not as a witness, and not in the presence of the accused—concerning the common enterprise, are not competent against another conspirator who is on trial: thus, on a prosecution for murder, it was error to admit a declaration made to another person, in defendant's absence, and after the crime had been committed, by a confederate who was not then on trial, that "You ought to see the other fellow," which tended to connect defendant with the crime, and which he claimed did not refer to deceased.

State v. Aiken, 294.

EVIDENCE—COMPETENCY OF ELIMINATING TESTIMONY.

22. On a prosecution for murder committed on board a ship, evidence as to the whereabouts of the various members of the crew on the night of the crime, was admissible, as tending to increase the probability that defendant, who was the last person with deceased, committed the crime.

State v. Warren, 348.

TRIAL—NAMES OF WITNESSES ON INFORMATION.

23. Under Laws, 1899, pp. 100, 101, § 5, providing that the name of each witness examined by a district attorney in support of any information shall be inserted at the foot of such information or indorsed thereon before it is filed, the examination of witnesses before a coroner's jury at an inquest, touching the cause of the death, is not such an examination in support of an information as will require the names of such witnesses to be indorsed on the information as a prerequisite to the right to introduce such witnesses at the trial.

State v. Warren, 348.

TRIAL—EXPERT TESTIMONY—ORDER OF HEARING WITNESSES.

24. Where deceased was found in his room, having evidently been killed by assault, and it appeared that defendant left such room early the night before, testimony of an expert as to how long it would take blood to clot in the manner of clotted blood found in the room was admissible as tending to show how long the crime had been committed when discovered; and where such evidence was offered in chief and erroneously excluded, admitting it in rebuttal, with permission to defendant to produce evidence to meet it, and allowing it to go to the jury as a part of the state's case in chief, was not an abuse of the court's discretion.

State v. Warren, 348.

TRIAL—TESTIFYING BY MEMORANDUM.

25. Where a witness testified in chief independently of any memorandum, the fact that on cross-examination he testified as to other matters exclusively from a memorandum which also related to the subject of his testimony in chief was not ground for taking his testimony in chief from the jury.

State v. Warren, 348.

TRIAL—BIAS OF WITNESS—CROSS AND REDIRECT EXAMINATIONS.

26. Where the defense on cross-examination of one of the state's witnesses, elicited the fact that such a witness had had a fight with defendant, it was competent on redirect examination of such witness to show the cause of the fight, as bearing upon the bias of the witness.

State v. Warren, 348.

CRIMINAL LAW—CONTINUED.

TRIAL—IMPEACHMENT BASED ON IRRELEVANT MATTERS.

27. Generally speaking, a party who has brought out irrelevant or immaterial testimony is bound thereby and will not be permitted to afterward contradict the witness on that subject, but there is no such restriction on the right of impeachment when the testimony is relevant, for example, where, in a prosecution for larceny of a horse, an issue is raised as to whether defendant purchased the animal from the complaining witness, questions asked the complaining witness on cross-examination as to his having stated to persons named that he sold the animal to defendant are relevant, and defendant is not bound by his answers, but may contradict him in the proper way. *State v. Deal*, 437.

TRIAL—FOUNDATION FOR IMPEACHMENT OF WITNESS.

28. Under Hill's Ann. Laws, § 841, providing that, before a witness can be impeached by evidence of inconsistent statements, such statements must be related to him, and he be permitted to explain them, a foundation for impeachment was laid where complaining witness, after testifying that he had traded three horses to defendant, but not the one in question, was asked if he had not, at a designated time and place, stated to a person named that he had traded the horse in question to defendant, to which he answered "No." *State v. Deal*, 437.

FOUNDATION FOR IMPEACHMENT.

29. A foundation for impeachment was also laid when the complaining witness was asked if, at a designated time and place, he had not stated to a person named that he had traded four horses to defendant, to which he answered "No." *State v. Deal*, 437.

INSTRUCTION TO ACQUIT.

30. To justify a direction to a jury to acquit there must be a total failure of proof, or the proof must be so weak that a verdict based upon it would clearly be unsupported—so unjustified that it would be the duty of the presiding judge to set it aside. *State v. Warren*, 348.

MOTION TO ACQUIT—SPECIFICATION OF REASONS.

31. Where, in a prosecution for larceny, a motion to direct a verdict of not guilty was based merely on the insufficiency of the evidence, it could not be urged for the first time on appeal that it was error to overrule the motion because there was no evidence that the taking was without the owner's consent; for, under the established practice in Oregon, a motion to acquit must specify the reasons on which it is based, unless it is for insufficiency of the evidence as a whole. *State v. Sally*, 366.

REFUSING DUPLICATE INSTRUCTIONS.

32. A judge may properly refuse to give requested instructions that are covered by his general charge. *State v. Sally*, 366.

INSTRUCTIONS MUST CLEARLY DEFINE THE CRIME CHARGED.

33. In trials where a defendant is charged with an offense the evidence to support which may show the commission of a somewhat similar but really different offense, the jury should be clearly instructed as to the difference between the two, and that defendant must be shown to be guilty of the one described in the indictment. *State v. Howard*, 50.

INSTRUCTION WITHDRAWING INCOMPETENT EVIDENCE.

34. On a prosecution for murder, error in admitting a declaration made in defendant's absence, after the crime was committed by a confederate, who was being separately tried, was not cured by a general instruction not to consider statements made by defendant's confederate in his absence after the commission of the homicide; the instruction should have more definitely identified the testimony to be disregarded. *State v. Aiken*, 294.

CRIMINAL LAW—CONCLUDED.

PRACTICE IN PRONOUNCING SENTENCE.

35. Whether a defendant is entitled to be asked if he has anything to say why sentence should not be pronounced, the right (if it is a right) is practically granted where the court overrules a motion for a new trial and at once pronounces sentence, for the defendant is present and has not been without a hearing. *State v. Sally*, 366.

HARMLESS ERROR.

36. Where a party was convicted of an assault with a dangerous weapon, a charge that he might be convicted of a simple assault was nonprejudicial, if erroneous. *State v. Kelly*, 20.

HARMLESS ERROR.

37. Error in admitting evidence is cured by directing the jury to disregard it; but the instruction must make clear the evidence referred to, and a general statement that a certain kind of testimony is not to be considered will not be sufficient. *State v. Aiken*, 294.

FAVORABLE ERROR IS HARMLESS.

38. Error in favor of an accused cannot be the basis of complaint, for it is manifestly harmless. *State v. Sally*, 366.

HARMLESS ERROR IN ADMITTING EVIDENCE.

39. Error in admitting testimony as to marks on a stolen article is harmless where the thing itself is before the jury. *State v. Sally*, 366.

CROSS BILL.

Waiving Demurrer to by Answering. See EQUITY, 10.

CROSS COMPLAINT in Law Action. See EQUITY, 3, 10.

CROSS EXAMINATION.

Scope and Purpose of—Error in—When Harmless. See WITNESSES, 1.
Right to Bring Out Facts Showing Feeling of Witnesses. See WIT. 2.

DAMAGES.

EVIDENCE INDIRECTLY SHOWING VALUE.

In an action for injury to a horse, it was not error to permit plaintiff to prove that since the accident he had hired horses to take the place of the one injured, and that he had paid a certain amount for such hiring, for the testimony tended to establish value.

Chaparon v. Portland Electric Co. 39.

DAYBOOKS as Evidence. See EVIDENCE, 21.

DEBTOR AND CREDITOR. See FRAUDULENT CONVEYANCES.

DECEDENTS' ESTATES. See EXECUTORS AND ADMINISTRATORS.

DECREES. Same as JUDGMENTS.

DEDICATION.

NATURE, REQUISITES AND PROOF.

1. Where owners of land make a plat thereof, and append thereto a writing reciting that they, being desirous of disposing of the land in small tracts, and "to assure the purchasers thereof the permanent enjoyment of the roads" shown on the plat, have caused the lands to be platted as shown by the plat, and this is acknowledged and recorded, and sales are made according to it, the dedication of the roads will be presumed to be in favor of the whole public. *Spencer v. Peterson*, 257.

DEDICATION—CONCLUDED.

EFFECT OF NOT IMPROVING DEDICATED ROADS.

2. Failure of a county or municipality to open or work roads laid out on a plat of land does not defeat the right of the public therein, unless barred by adverse user. *Spencer v. Peterson*, 257.

PLAT—EVIDENCE OF INTENTION OF DEDICATOR.

3. A member of a real estate firm engaged as selling agents of the proprietors of land, who have made a plat thereof, on which are roads, may testify as to the proprietors' intention to dedicate the roads, as he must have known their intention in this respect.

Spencer v. Peterson, 257.

DEED.

EFFECT OF QUITCLAIM DEED.

A grantee in a bargain and sale deed may be a *bona fide* purchaser, as the form of the conveyance is immaterial.

Advanc Co. Thresher Co. v. Esteb, 469.

DEFECTIVE APPLIANCE. See MASTER AND SERVANT, 16.

DEFINITIONS. Same as WORDS AND PHRASES.

DEGREE OF PROOF Required in Civil Cases. See EVIDENCE, 32.

DELEGATION OF POWER by Legislature. See CONST. LAW, 4.

DELAY. When Fatal to Enforcement of Rights. See EQUITY, 5.

DEMURRER on Ground of Laches. See EQUITY, 9.

DEPUTIES.

Power of to Act for Their Principal. See OFFICERS.

DIRECTING VERDICT.

Propriety of Instruction to Find for Defendant. See TRIAL, 6, 7, 8.

DISBURSEMENTS. Same as COSTS.

DISCRETION OF COURT.

Question of Laches is Usually Discretionary. See EQUITY, 4.

Order Referring Case is Discretionary. See REFERENCE, 2.

DISMISSAL AND NONSUIT.

Appeal—Reviewing Motion for Nonsuit. See APPEAL, 9, 10.

DISMISSING APPEAL.

Defective Abstract—Allowing Amendments. See APPEAL, 12.

DISTRICT AND PROSECUTING ATTORNEYS.

FEES OF DISTRICT ATTORNEYS IN DIVORCE CASES—STATUTES.

Since the act of 1899, placing district attorneys on a salary and cutting off all fees and compensation except their salaries (which does not apply to Multnomah County), the district Attorney fee in divorce cases required by Section 1074 of Hill's Ann. Laws, need not be paid, as the later act (Laws, 1899, pp. 184, 185, § 3), repeals section 1074 by implication in its application to all counties except Multnomah.

Howard v. Clatsop County, 149.

DISTRICT BOUNDARY BOARD. See SCHOOLS.

DIVORCE.

PAYMENT OF DISTRICT ATTORNEY'S FEE.

Since 1899 plaintiffs in divorce cases outside of Multnomah County are not obliged to pay the fee formerly required for the district attorney.

Howard v. Clatsop County, 149.

DOCUMENTARY EVIDENCE. See EVIDENCE, 22.

DORMANT PARTNER, Rights of. See PARTNERSHIP.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 2.

EATING HOUSE.

Using Land for a Hotel—When is a Railroad Purpose. See RAILROADS.

ELECTRICITY.

NEGLIGENCE—*RES IPSA LOQUITUR*.

1. The fact that injury has resulted from a broken and fallen live electric wire is enough, under the doctrine of *res ipsa loquitur*, to raise a disputable presumption of negligence on the part of the owner of the wire, relieving plaintiff from showing further facts, and excluding the presumption that it was not due to defendant's negligence.

Chapron v. Portland Electric Co. 39.

INSTRUCTION ON *RES IPSA LOQUITUR*.

2. In an action against an electric light company for injuries received from contact with a broken live wire, where the complaint alleged that the wire was weak and defective and improperly strung, an instruction that if it was proved that the accident was caused by the breaking of the wire the law presumed negligence, requiring defendant to show by preponderance of the evidence that it was not at fault, was not erroneous as permitting the jury to find negligence on grounds not charged, when the jury were told that plaintiff could only recover on the negligence charged, and that the undisputed evidence of defendant raised the presumption that the wire was sufficient in size and quality, and that it would be necessary to find, in order to find for plaintiff, that the stringing of the wire was negligently done, or that it was negligently allowed to get out of its place.

Boyd v. Portland Electric Co. 336.

INJURY FROM BROKEN LIVE WIRE—EVIDENCE OF NEGLIGENCE.

3. In an action for injuries to a horse and vehicle caused by a broken wire, charged with electricity, suspended over a street, it appeared that the horse attached to the vehicle, after entering a certain street, suddenly fell. The driver sprang to the ground, and saw a live wire close to the wagon wheel. He did not see the horse come in contact with the wire. The horse, while struggling to his feet, touched the wire, when he again fell, "as if shot." A witness saw sparks thrown from the wire, and, approaching near to it, received a shock from the ground. It was shown that the wire had remained broken for an hour before the accident. *Held*, that the jury was justified in finding that the injury was caused by an electric shock from the wire, and hence it was proper to refuse a motion for nonsuit.

Chapron v. Portland Electric Co. 39.

EVIDENCE OF NEGLIGENCE.

4. Where a person injured by contact with a broken live electric wire, charged that the wires were weak and improperly strung, and showed that in a wind of not unusual velocity a wire broke from its fastening and burned through another wire, the ends of which fell across a public street and injured plaintiff, there is more than an inference of negligence, there is affirmative evidence of an improper construction of the line, requiring the consideration of the jury.

Boyd v. Portland Electric Co. 336.

ELECTRICITY—CONCLUDED.

EVIDENCE OF NEGLIGENCE.

5. In an action for injuries caused by a broken electric wire, where defendant produced evidence tending to show that the wire was broken during the night of the accident by reason of a storm, that the wires and the poles on which they were fastened were inspected once every day, that the best approved appliances for discovering breaks in the wires were used, and that on the night in question such tests were applied every half hour, and that the detector failed to indicate the parting of the wire, it was for the jury to determine whether this evidence excused defendant. *Chapron v. Portland Electric Co.* 39.

NEGLECTANCE—TIME ALLOWED TO REPAIR BROKEN WIRE.

6. In an action for injuries sustained by reason of a broken wire charged with electricity, an instruction that defendant was entitled to a reasonable time after the fall of the wire to repair it, and would not be liable for an injury occurring before such time, was properly refused, because it was misleading, in not being limited to a case where the wire had broken without defendant's negligence.

Chapron v. Portland Electric Co. 39.

INSTRUCTION AS TO DUTY OF DEFENDANT.

7. In an action against an electric light company for injuries received from contact with a broken live wire an instruction that where the circumstances of the accident indicated that it might have been unavoidable notwithstanding reasonable and proper care, plaintiff, charging negligence, could not recover without showing that the defendant violated a duty imposed upon it from which the injury followed as a natural sequence, was properly refused, where there was any affirmative evidence of negligence.

Boyd v. Portland Electric Co. 336.

PLEADING NEGLIGENCE MAINTENANCE OF BROKEN WIRE.

8. A complaint in an action for injury to a horse and vehicle through a broken wire, charged with electricity, suspended over a street, which alleges that defendant negligently permitted such wire to become and remain broken on the street, is not bad for failing to allege that the wire also struck the horse by reason of defendant's negligence.

Chapron v. Portland Electric Co. 39.

ELECTRIC LIGHT POLE AS DANGEROUS PLACE TO WORK.

9. A pole carrying electric light wires is not necessarily a dangerous place to work, with reference to the currents, that will depend upon the care exercised at the controller; and it need not be alleged that the workman did not know the place to be dangerous, for it was not so except by the employer's carelessness.

Hough v. Grants Pass Power Co. 531.

EMINENT DOMAIN.

VOID SALE OF LAND CONDEMNED FOR STREETS.

1. Where an owner of property, a part of which had been condemned for a street, had been awarded damages in excess of benefits, a sale of an uncondemned part of such property for an assessment for the improvement was void.

Gaston v. Portland. 373.

EFFECT OF ERROR IN WARRANT TO PAY FOR CONDEMNED LAND.

2. Under Laws, 1898, p. 147, § 117, which provides that as soon as the appropriation to pay the assessed damages shall be in the city treasury, subject to the warrants in favor of the owners of condemned property, and the warrants drawn and ready for delivery, private property shall be deemed appropriated for street purposes, and not otherwise, an error in drawing warrants in favor of a property owner for an amount greater than that to which she was entitled did not nullify the entire proceedings, so as to prevent the appropriation of the property, as her rights had been fully protected, and she could take so much of the fund as she was entitled to.

Gaston v. Portland. 373.

EQUAL PROTECTION OF THE LAWS. See CONST. LAW, 3.

EQUITY.

EQUITABLE ASSIGNMENT OF DEBT—EFFECT OF ORDER.

1. An order upon a specified fund operates as an equitable assignment of a part of the fund, entitling the payee thereof to payment in full out of the fund to the exclusion of the general creditors of the drawer of the order, after its presentation to the holder of the fund.

Willard v. Bullen, 25.

REMEDY AT LAW—WAIVER OF BY ANSWERING.

2. An objection to the jurisdiction on the ground that plaintiff's remedy is at law, and not in equity, not made in the court below, is waived.

Larch Mountain Invest. Co. v. Garbade, 123; *Wollenberg v. Rose*, 314.

REMEDY AT LAW—WHEN NOT EFFICIENT.

3. Where, in an action at law for the price of wheat delivered, defendant files a cross bill in equity, under Section 381 of Hill's Ann. Laws, setting up that the wheat was delivered in part payment on a parol contract for a sale of land to plaintiff, and seeks to foreclose the vendor's interest in the land, the remedy at law is not as efficient for defendant as the bill, and the cross bill is not objectionable because it may suggest a sufficient legal defense.

Wollenberg v. Rose, 314.

LACHES—DISCRETION OF COURT.

4. The question whether one claiming payment out of a fund in litigation was guilty of laches in intervening to protect his claim, being within the judicial discretion of the trial court, its allowance of the claim will not be disturbed by the appellate court.

Willard v. Bullen, 25.

WHEN LACHES IS A DEFENSE.

5. Where, through the laches of a complainant in equity, it has become doubtful whether defendant can command the evidence necessary for a fair presentation of his case, or defendant has been deprived of any advantage which he might have had, or will be subjected to any hardship that might have been avoided, if the suit had been seasonably instituted, equity will not grant relief, though the full limitation applicable to a remedy at law may not have expired.

Wilson v. Wilson, 459.

EXAMPLE OF LACHES.

6. Two years after the death of one of two partners his foreign administrator sued the surviving partner within this state on notes previously executed to deceased in settling firm business. Defendant (plaintiff) here attempted to set up equitable defenses by way of answer, but made no attempt to avail himself of them by way of cross bill, as he could have done, and judgment went against him. Subsequently his land was sold under the judgment, and purchased by the administrator as such, and still later a domestic administrator appointed for deceased sold the land so purchased by the foreign administrator, and defendant (present plaintiff) purchased it. None of the partnership assets, except the notes, were accounted for to the administrators; the surviving partner remaining in possession of them. Ten years after decedent's death, and after the administrators had applied most of decedent's personal assets upon his debts, and had practically settled his estate, the surviving partner sues for an accounting, and seeks the benefit of his equitable defenses to the notes, alleging further that his deed from the domestic administrator is void, and seeking to impress a trust upon the land. *Held*, that the claim is barred by laches.

Wilson v. Wilson, 459.

EQUITY—CONCLUDED.

NUMEROUS PARTIES—SUIT BY PART ON BEHALF OF ALL.

7. Ten out of a hundred persons jointly interested in a fund cannot bring a suit on behalf of all, under Section 385 of Hill's Ann. Laws, to recover and distribute such fund, where as many as thirty-four of the interested parties state in court that they are not willing to contribute to the expense of the suit. To such a suit all those entitled to share in the fund are necessary parties, and should be brought in as plaintiffs or defendants. *Tobin v. Portland Mills Co.* 269.

PLEADING—QUIETING TITLE.

8. In a suit in form to quiet title, plaintiff, who was a riparian owner, alleged that there was between the meander line and the line of high water a strip of land not in possession of another, and to which, as riparian owner, he had title. The answer alleged that the meander line and the line of ordinary high water coincided, and defendant claimed the land between high and low-water marks. *Held*, that, the dispute not being one as to the location of a boundary, but as to whether there was any upland between the meander line and the line of high water, a contention that the controversy was as to the true location of a boundary line, and triable at law, was without merit. *Johnson v. Tomlinson*, 198.

DEMURRER ON GROUND OF LACHES.

9. The question as to whether a claim or demand is too stale to form the basis of a suit in equity may be raised by demurrer where the complaint shows the requisite facts. *Wilson v. Wilson*, 459.

DEMURRER TO EQUITABLE CROSS BILL—WAIVER BY ANSWERING.

10. A demurrer to an equitable cross bill in a law action is waived by answering, and it cannot afterward be insisted that the cause should have been tried in the law forum. *Wollenberg v. Rose*, 314.

DECREE MUST FOLLOW THE PLEADINGS.

11. Judgments and decrees must follow the pleadings on which they are based, and even a court of equity having jurisdiction cannot grant relief beyond or other than that justified by the pleadings. *Coughanour v. Hutchinson*, 419.

CONNECTION BETWEEN PLEADINGS AND DECREE.

12. While plaintiff, who had taken a deed to mortgaged land, containing a misdescription, was entitled to redeem, or perhaps to compel the mortgagee to elect to accept the amount due on the mortgage, or release the premises in question, this relief could not be granted in a suit to reform the deed and for possession of the land, the bill in which contained no mention of the mortgage, no allegations on which an accounting could be had, nor averment of an offer to pay the mortgage; a court of equity, though having acquired jurisdiction, not being able to grant relief outside the pleadings. *Coughanour v. Hutchinson*, 419.

ESCAPE.

Indictment for Aiding a Prisoner. See CRIMINAL LAW, 9, 10.

ESCHEAT.

RELATIVE RANK OF PROBATE AND ESCHATE PROCEEDINGS.

1. Construing together, Section 895 of Hill's Ann. Laws, conferring on county courts exclusive probate jurisdiction; sections 1183 and 1191, directing the payment of claims, charges and legacies, and the distribution of the remaining proceeds of personal property; section 3099, providing that the residue of personal property shall escheat; and sections 3135, *et seq.*, prescribing the method of procedure; it is reasonably apparent that the beginning of an escheat proceeding in a circuit court, as provided by sections 3136 and 3137, was not intended to interfere with or to interrupt the usual proceedings in the county court in a given estate, or to affect the jurisdiction of that court in any way.

State v. O'Day, 495.

RIGHT OF STATE TO APPEAR IN COUNTY COURT.

2. The state, when in pursuit of escheated property, has the same right to appear in a county court and determine questions of heirship that a natural person has, and it is bound by the proceedings in that court, until reversed or set aside, as a natural person would be; in other words, having possession of the personal property of an estate, and having given the notice of distribution designated by statute, and in the manner required, the orders of the county court based thereon cannot be collaterally attacked.

State v. O'Day, 495.

ESTOPPEL.

ESTOPPEL TO CHANGE POSITION ONCE ASSUMED.

1. One who has, with knowledge of the surrounding circumstances, deliberately assumed a particular position, must act consistently, and will not be permitted to change his position to the prejudice of others who, to his knowledge, have relied on his conduct in protecting their rights.

Larch Mountain Invest. Co. v. Garbade, 123.

CORPORATIONS—PRESUMED KNOWLEDGE OF STOCKHOLDERS—ESTOPPEL.

2. The mere fact of being a stockholder in a corporation does not charge one with knowledge of all that occurs at the stockholders' meetings, so as to act as an estoppel.

Martin v. Eagle Develop. Co. 448.

EVIDENCE.

JUDICIAL NOTICE OF MEANING OF WORDS.

1. Under Hill's Ann. Laws, § 708, subd. 1, providing that courts shall take judicial notice of the meaning of all English words and phrases and all legal expressions, such notice will be taken of only the ordinary meaning of current words and phrases; and, if an unusual meaning is sought to be attached to words used in pleadings, such meaning must be explained. The following illustrates this: Defendants alleged fraud in the sale of mining property in that plaintiffs falsely represented that the land would yield gold not less than ten cents per yard "from the grass roots down," and that plaintiffs had "prospected" the land and knew the value thereof. *Held*, that, as the expression "from the grass roots down" ordinarily means to the center of the earth, and not merely to bedrock, and as "prospected" ordinarily means to do experimental work to ascertain the probable value of a mining claim, and not to accurately ascertain the actual value by sinking holes to bedrock and testing the earth, plaintiffs' alleged misrepresentations were apparently mere expressions of opinion, and not statements of fact, and if any other meaning attached to the expressions used, it should have been pleaded.

Martin v. Eagle Develop. Co. 448.

EVIDENCE—CONTINUED.

SUPPLEMENTARY PROCEEDING—ORDER—PRESUMPTION.

2. An order in supplementary proceedings requiring a defendant to apply certain money to the satisfaction of the judgment is not supported by a referee's finding that on a date more than three months prior to the reference he had such money in his possession, and that, no evidence to the contrary having been offered, he was therefore still in possession thereof; the presumption invoked to support the order being insufficient for that purpose. *Hammer v. Downing*, 234.

DECLARATIONS OF CO-CONSPIRATOR SUBSEQUENTLY MADE.

3. Statements made by one of several conspirators—not as a witness, and not in the presence of the accused—concerning the common enterprise, are not competent against another conspirator who is on trial.

State v. Aiken, 294.

COMPETENCY OF TESTIMONY ELIMINATING OTHER POSSIBILITIES.

4. On a prosecution for murder committed on board a ship, evidence as to the whereabouts of the various members of the crew on the night of the crime was admissible, as tending to increase the probability that defendant, who was the last person with deceased, committed the crime.

State v. Warren, 348.

BURDEN OF PROOF TO OVERCOME PRESUMED REGULARITY OF TAX DEED.

5. Though, under Hill's Ann. Laws, § 2823, making a tax deed *prima facie* evidence of the regularity of the proceedings, the burden is on the person attacking a deed to prove the irregularity, the return of the sheriff on the tax roll showing such fact is sufficient to vitiate the deed.

Brentano v. Brentano, 15.

BURDEN OF PROOF TO SHOW NOTICE OF EQUITABLE TITLE.

6. A plaintiff in an action of ejectment, claiming under a deed unrecorded when defendants obtained the legal title, has the burden of showing that they had notice of his title.

Advance Thresher Co. v. Esteb, 469.

RES GESTAE.

7. In a suit to avoid a deed as fraudulent the grantors statements to the notary before whom the deed was acknowledged as to the intent with which it was executed are part of the *res gestae* and admissible in evidence on that ground.

Robson v. Hamilton, 239.

BEST EVIDENCE—ORAL TESTIMONY—JUDICIAL RECORDS.

8. Facts that are contained in judicial records may sometimes be proved by parol, depending on the purpose for which the facts are to be used; for example, a party wishing to show that a certain arrest had been made at the instigation of a particular person, may offer the oral testimony of witnesses who know the facts.

Oliver v. Hutchinson, 443.

SECONDARY EVIDENCE—EFFORT TO FIND LOST PAPER.

9. No exact rule can be stated for determining the amount of diligence that must be expended in searching for a lost writing before secondary evidence of its contents can be received in evidence, as provided for by Hill's Ann. Laws, § 691, but the party alleging the loss must show that he has in good faith exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would suggest and which are accessible; for example, secondary evidence of the contents of a writing should not be received where the person who last had the original states that he last saw it about a year before in the files of a certain case in the court house, and adds, "I have searched all the files and records,—all the papers that I have in my office; in fact, I have made a pretty clean search for it. I haven't it in my possession at all," for this amounts only to a statement that he had searched in his own office, and presumably the paper was still in the files where he last saw it.

Harmon v. Decker, 587.

EVIDENCE—CONTINUED.

SECONDARY EVIDENCE—EXPERT SUMMARY OF BOOKS.

10. Under Hill's Ann. Laws, § 691, subd. 5, permitting oral evidence of the contents of a writing where the original consists of numerous accounts, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, it is competent to show by an expert accountant the condition of books kept by or under the direction of the defendant, who is charged with conversion of his principal's money, and the tabulated results of his examinations. *Salem Traction Co. v. Anson*, 562.

EFFECT OF ADMISSIONS.

11. A statement of defendant, who alleged he was to pay rent for a wharf only so long as he occupied and used it, that the lease was for an indefinite time, and that he did not surrender possession, is not an admission that he was to pay rent, without regard to use and occupancy. *Ladd v. Hawkes*, 247.

ADMISSIONS OF AGENT AFTER TERMINATION OF AGENCY.

12. In an action against a municipal corporation for injuries from a defective sidewalk, statements by an ex-councilman as to what knowledge he had of the defect while a member of the city council were not admissible, as he could not bind the city after the termination of his term. *Adkins v. Monmouth*, 266.

DECLARATIONS OF POSSESSOR OF CHATTEL AS EVIDENCE OF OWNERSHIP.

13. Where the subject of inquiry is the right of one in possession of chattels, his statements concerning his possession are competent as part of the *res gestae*, provided they explain or illustrate the character of his holding: for example, in replevin by a wife to recover a livery stable levied on for her husband's debt, where the only controversy was as to the ownership of the property, testimony that the husband, while in charge of the stable, the wife not being present, rented a team to witness, agreeing that the price should be credited on the husband's debt to witness, and that, when the busy season was over, he might have a team to apply on the same debt, was incompetent as against the wife. *Noblitt v. Durbin*, 555.

DECLARATIONS AS TO PAST EVENTS—COMPETENCY OF.

14. A statement by a person at the time of an act and explanatory thereof is often competent evidence, but not a statement made afterwards, when the rights of other persons are involved: thus, in replevin by a wife to recover property levied on for her husband's debt, the only controversy was as to the ownership of the property, testimony that the husband told the witness that he had reasons for having the bill of sale of the property made in favor of his wife was incompetent. *Noblitt v. Durbin*, 555.

SELF-SERVING DECLARATIONS.

15. A statement by defendant to plaintiff that he had quit business, and did not want the wharf any longer, is not a self-serving declaration; he alleging that, by the terms of the letting, he was to pay rent only so long as he occupied and used the wharf. *Ladd v. Hawkes*, 247.

HEARSAY—EX PARTE AFFIDAVITS.

16. In a suit by depositors of wheat in a warehouse to compel an accounting for wheat delivered by the warehouseman to defendants without the consent of the depositors, affidavits of the depositors as to the deposit, amount, and authority to remove or dispose of the wheat, made on *ex parte* examinations, and without opportunity of defendants to cross-examine, are hearsay, and inadmissible in evidence. *Tobin v. Portland Mills Co.* 269.

EVIDENCE—CONTINUED.

PRIVATE WRITINGS.

17. The recognition on his business books by a debtor for a series of years of an annual interest charged in favor of a certain creditor, coinciding with the charges in the books of the creditor, is not an admission of liability for the principal on which the interest was calculated.

Harmon v. Decker, 587.

ENTRIES IN BOOKS AS EVIDENCE OF LOANS TO OTHERS.

18. Charges in a merchant's accounts to defendant, to cash advanced to, and checks in favor of, other persons, should be excluded, the entries not showing that they are for moneys loaned defendant or furnished others on his orders.

Harmon v. Decker, 587.

BOOKS OF ACCOUNT AS EVIDENCE OF LOANS OF MONEY.

19. The history and development of the law relating to the proving by books of account of loans of money by merchants to customers is reviewed and discussed in this case.

Harmon v. Decker, 587.

BOOKS OF ACCOUNT AS EVIDENCE—ENTRIES NOT ORIGINAL.

20. Successive entries in a pass book, the first purporting to be two years before the second, with a year intervening between each of the others, are not admissible in evidence as original entries; it appearing by a bill of particulars attached to the complaint that many other items intervened, thus showing that the entries were only summaries copied from the ledger.

Harmon v. Decker, 587.

RANK OF DAYBOOKS AS EVIDENCE.

21. Daybooks, being usually made hurriedly and not upon consideration of the interested parties, are not as conclusive evidence as contracts or other papers of that class. As an application of this, an entry in the daybook of a deceased merchant, designating a certain charge as a note, may be shown to have actually been for merchandise.

Harmon v. Decker, 587.

DOCUMENTARY EVIDENCE—STUBS OF RECEIPT BOOKS.

22. Where, in a suit by depositors of wheat in a warehouse to compel an accounting for wheat shipped by the warehouseman to defendants, without the depositors' authority, it appeared that the amount bought by defendants was more than the amount belonging to the depositors and unaccounted for, but such excess was commingled with the depositors' wheat, the defendants were tenants in common with the depositors, and parties to the transactions recorded in the warehouseman's receipt book containing the stubs of the receipts issued to the depositors, rendering them admissible in evidence as books of original entry.

Tobin v. Portland Mills Co. 269.

PROPRIETY OF RECEIVING CORROBORATIVE EVIDENCE.

23. Where evidence is rejected other supplementary evidence offered only in corroboration is properly rejected also.

Harmon v. Decker, 587.

EXPLAINING TERMS OF WRITTEN INSTRUMENT.

24. An unqualified indorsement of negotiable paper is a written contract excluding parol evidence to vary its terms, while an indorsement without recourse is not a contract, but merely operates to transfer the title; and hence parol evidence is admissible to show that at the time of the transfer of a note by indorsement without recourse the buyer agreed to take the paper at his own risk, absolutely relieving the indorser even from the implied warranty of genuineness attending such a transfer.

Carroll v. Nodine, 412.

EVIDENCE—CONCLUDED.

OPINION EVIDENCE ON TECHNICAL SUBJECT.

25. Where a person was found in his room, having evidently been killed by assault, and it appeared that defendant left such room early the night before, testimony of an expert as to how long it would take blood to clot in the manner of clotted blood found in the room was admissible as tending to show how long the crime had been committed when discovered.
State v. Warren, 348.

OPINION EVIDENCE OF INTENTION OF DEDICATOR OF PLAT.

26. A member of a real estate firm engaged as selling agents of the proprietors of land, who have made a plat thereof, on which are roads, may testify as to the proprietors' intention to dedicate the roads, as he must have known their intention in this respect.
Spencer v. Peterson, 257.

COMPETENCY OF OPINION EVIDENCE.

27. One who purchased property for a special purpose and has used it for that purpose during a considerable time,—say five years,—is competent to estimate the value of such property.
Chapron v. Portland Electric Co. 39.

SHOWING COMPETENCY OF EXPERT BY CROSS-EXAMINATION.

28. Where the competency of an expert witness was not shown at the time he testified in chief, but was made fully apparent on cross-examination, admission of his testimony was not error.
Hough v. Grants Pass Power Co. 531.

WEIGHT OF EVIDENCE—QUESTION FOR JURY.

29. On appeal the court can only examine the testimony for the purpose of ascertaining whether there was any competent evidence tending to support the conclusions of the trial judge.
Salem Traction Co. v. Anson, 562.

WEIGHT OF EVIDENCE—PROVINCE OF JURY.

30. Where plaintiff made a *prima facie* case, though depending largely upon his own testimony, which was contradicted by several of defendant's witnesses, defendant's evidence being confined to contradiction, a verdict for plaintiff would not be disturbed, in view of Hill's Ann. Laws, §845, subd. 2, providing that the jury are not bound to find in conformity with the declarations of any number of witnesses against a less number.
Huber v. Miller, 103.

WEIGHT OF EVIDENCE IS A QUESTION FOR THE JURY.

31. Where there is any evidence reasonably tending to support the allegations of a complaint, the case should be submitted to the jury, as they are the judges of the value of testimony. *Chapron v. Portland Electric Co. 39; Baines v. Coos Bay Navigation Co. 135.*

QUANTUM OF PROOF IN CIVIL ACTIONS.

32. In civil actions, as, a case in which the jury must determine whether a road has been dedicated, only a preponderance of the evidence is necessary to a verdict.
Spencer v. Peterson, 257.

See ACCOUNT STATED, 4; ADVERSE POSSESSION, 4, 6; BOUNDARIES, 1;

CARRIERS, 14; DEDICATION, 3; FRAUDULENT CONVEY-

ANCES, 3, 4, 6, 11, 16, 17; MASTER AND

SERVANT, 14, 15; NEGLIGENCE, 6.

EXECUTION.

SUPPLEMENTARY PROCEEDING—PRESUMPTION AS TO KEEPING CASH.

1. An order in supplementary proceedings requiring a defendant to apply certain money to the satisfaction of the judgment is not supported by a referee's finding that on a date more than three months prior to the reference he had such money in his possession, and that, no evidence to the contrary having been offered, he was therefore still in possession thereof; the presumption invoked to support the order being insufficient for that purpose. *Hammer v. Downing*, 234.

EXECUTION SALE—SUFFICIENCY OF SHERIFF'S RETURN.

2. A sheriff's return on an execution reciting, "I further certify that I advertised said sale also by posting copies of the said notice in three public places in the county of M. and State of Oregon," etc., was sufficient, and an objection that it did not set forth facts showing that the places where the notices were posted were public places was untenable.

United States Mortgage Co. v. Marquam, 391.

EXECUTION SALE—OBJECTION NOT MADE BEFORE TRIAL COURT.

3. An objection that there was not sufficient proof of the publication of a notice of sale on execution could not be taken for the first time on appeal from a decree confirming the sale, but should have been raised in the trial court.

United States Mortgage Co. v. Marquam, 391.

IMPLIED AMENDMENT OF LAW AS TO MAKING LEVY.

4. The 1899 amendment of Section 149 of Hill's Ann. Laws, relating to attachments (Laws, 1899, p. 231, § 1), repealed by implication so much of section 238, subd. 4, as directed the omission to file a certificate by the sheriff—for now an execution can be levied only by filing a certificate.

Advance Thresher Co. v. Esteb, 469.

RIGHT OF PURCHASER OF LEASED PREMISES TO THE RENT.

5. Under Section 307 of Hill's Ann. Laws, providing that a purchaser of land at a judicial or execution sale, from the day of sale until a resale or redemption shall be entitled to the possession, unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be "entitled to receive from the tenants the rents, or the value of the use and occupation thereof, during the same period," a tenant of land sold on foreclosure who is holding under an unexpired lease made by the owner of the property subsequent to the mortgage, must pay to the purchaser thereof, whether the mortgagee or not, the rent, or the value of the use and occupation of the premises, from the day of sale, notwithstanding, in accordance with his lease, he has paid the rent in advance to his lessor.

United States Mortgage Co. v. Willis, 481.

EXECUTORS AND ADMINISTRATORS.

CONTROL OF PERSONAL PROPERTY DURING ADMINISTRATION.

1. The personal property of a decedent goes to the administrator, and all title thereto must be derived through him; but the title to real property descends at once and directly to the heirs under Section 1120 of Hill's Ann. Laws.

State v. O'Day, 495.

PROCEEDINGS FOR ACCOUNTING.

2. Where, after the giving of notice of the settlement of the final account of an administrator, he is removed, and another is appointed, such action does not destroy the efficacy of the notice.

State v. O'Day, 495.

EXECUTORS AND ADMINISTRATORS—CONCLUDED.

APPLICATION AND ORDER TO MORTGAGE—COLLATERAL ATTACK.

3. An order of a county court authorizing an administrator to mortgage the real property of an estate, based on a verified petition setting forth all the facts required by the statute to exist before such an order can be made, see Laws, 1898, p. 34, § 2, is conclusive, in case it is attacked collaterally, if the county court had jurisdiction to administer the estate, notwithstanding the application for permission to sell was by a petition, while the statute provides that the court may act when certain facts are "shown by affidavit." *Lawrey v. Sterling*, 518.

COLLATERAL ATTACK ON AVERMENTS OF THE PETITION.

4. Where the petition by an administrator to borrow money on estate property to pay debts, as authorized by Laws, 1898, p. 34, states facts showing the need of a certain sum, an objection that the record of the court showed that it was unnecessary to borrow so large a sum will not be considered on collateral attack. *Lawrey v. Sterling*, 518.

IMPLIED AUTHORITY OF ADMINISTRATOR TO GIVE NOTE FOR LOAN.

5. Under the familiar principle of statutory interpretation that, whenever a right is granted by law, the power necessary to make the right available is also impliedly conferred, a statute authorizing executors and administrators to mortgage the real property of estates (Laws, 1898, p. 34, § 1), confers also the authority to execute a promissory note for the loan, with such provisions as are in common use in the community, which, in Oregon, would include a promise to pay an attorney fee in case of suit or action. *Lawrey v. Sterling*, 518.

POWER OF EXECUTOR TO BORROW TO FUND INDEBTEDNESS.

6. A statute such as Laws, 1898, p. 34, § 2, authorizing executors or administrators to mortgage the real property of estates "for the purpose of funding the indebtedness," does not in any way make the number of creditors a factor in the question of the right to mortgage—it can be exercised to pay the debt of one creditor, or many.

Lawrey v. Sterling, 518.

EXPECTED ANSWER.

Statement of What Witness Will Testify. See TRIAL, 2.

EXPERT EVIDENCE.

Showing Opinions on Technical Subject. Time Required for Human Blood to Clot When Exposed to the Air. See EVIDENCE, 24.

FAVORABLE ERROR is Harmless. See APPEAL, 16.

FELLOW SERVANTS. See MASTER AND SERVANT, 6.

FEES

Of District Attorneys in Divorce Cases Outside of Multnomah County Since 1899. See DISTRICT ATTORNEYS.

FENCES.

CONSTRUCTION OF FENCE LAW.

Hill's Ann. Laws, §3445, providing that all fields and inclosures (with a certain exception) shall be fenced, does not apply to exterior fences only; so that a plaintiff, whose lands are fenced in a common inclosure with defendants' lands, cannot recover for trespass of defendants' cattle, not having separated his lands from theirs by a fence, in the absence of malicious prevention by defendants. *Olivcr v. Hutchinson*, 443.

FINDINGS

Of Trial Court in Equity Not Binding on Appeal. See *APPEAL*, 22.
Must be Confined to Issues Made in Pleadings. See *TRIAL*, 13, 14, 15.

FISH.

Repeal of Law of 1898 by Act of 1901. See *STATUTES*, 6.
Power to Appoint Master Fish Warden. See *CONST. LAW*, 4.

FORECLOSURE

Of Equitable Lien of Seller. See *VENDOR AND PURCHASER*.
Of Mortgages—Rights of Parties. See *MORTGAGES*, 3, 8, 9.

FORMER ADJUDICATION.

Effect of on Subsequent Proceedings. See *JUDGMENT*, 2-6.

FRAUD.

ELEMENTS OF CAUSE OF SUIT FOR FRAUD OR DECEIT.

1. To sustain a suit based on fraud or deceit it must appear that there were false representations of material import concerning the subject-matter of the contract, made by the other party with knowledge of their falsity, or made as of his own knowledge, not knowing whereof he spoke, for the purpose of misleading and deceiving, and such representations must have been relied upon, to the injury of the deceived party.

Martin v. Eagle Development Co. 448.

DECEPTION CONSTITUTING FRAUD.

2. Where a purchaser of mining property alleged fraud in the vendor's representations that he was the owner of a certain number of inches of water in a certain creek, and had made a valid and indefeasible location thereof, but it appeared that immediately after the purchase the purchaser relocated the water claimed by the vendor,—its notice reciting that the same had been sold to the purchaser,—it was apparent that the purchaser knew the interest owned by the vendor, and hence was not misled.

Martin v. Eagle Development Co. 448.

DECEPTION AMOUNTING TO FRAUD.

3. Defendants alleged fraud in the sale of mining property in that plaintiffs falsely represented that the land would yield gold not less than ten cents per yard "from the grass roots down," and that plaintiffs had "prospected" the land and knew the value thereof. *Held*, that, as the expression "from the grass roots down" ordinarily means to the center of the earth, and not merely to bedrock, and as "prospected" ordinarily means to do experimental work to ascertain the probable value of a mining claim, and not to accurately ascertain the actual value by sinking holes to bedrock and testing the earth, plaintiffs' alleged misrepresentations were apparently mere expressions of opinion, and not statements of fact, and if any other meaning attached to the expressions used, it should have been pleaded.

Martin v. Eagle Development Co. 448.

DECEPTION AMOUNTING TO FRAUD.

4. Where defendant alleged that plaintiffs on sale of mining property were guilty of fraud in representing that a certain ditch could be constructed for a certain sum, and that plaintiffs, after the sale, undertook to construct the ditch for the amount for which they represented it could be done, and failed, but there was no showing that plaintiffs entered on the work without intending to complete it, or knew that it could not be done for the price they had named, it was not made to appear that plaintiffs' statement as to the cost of the ditch was made with knowledge of its falsity.

Martin v. Eagle Development Co. 448.

FRAUDS, STATUTE OF. Same as *STATUTE OF FRAUDS*.

FRAUDULENT CONVEYANCES.

GENERAL PRINCIPLES.

1. In determining the legality of an alleged fraudulent conveyance the courts inquire whether there was an adequate genuine consideration, and whether a secret benefit was reserved to the grantor—and unless at least one of these points is decided in the negative the conveyance must be sustained. *Hease v. Barrett*, 202.

GRANTOR'S INSOLVENCY AND INTENT.

2. A debtor's voluntary conveyance may be set aside at the suit of creditors without proof that the debtor believed himself insolvent at the date of the conveyance, if his solvency at the time was contingent on the stability of the market in the business in which he was engaged.

Brown v. Case, 221.

IDEM—RES GESTAE.

3. In a suit to set aside a deed as in fraud of creditors, the grantor's declarations to the notary at the time the conveyance was executed as to intent were admissible as *res gestae*. *Robson v. Hamilton*, 230.

SOLVENCY OF GRANTOR CONSIDERED.

4. Evidence held sufficient to show that a grantor of realty was solvent at the time he executed a conveyance for a consideration possibly somewhat inadequate. *Brown v. Case*, 221.

ADEQUACY OF CONSIDERATION FOR TRANSFER.

5. A quitclaim deed executed by a husband, in which his wife joined without knowing the nature of the instrument, was given as security for the payment of a debt. It was agreed between the husband, the creditor, and the grantee that the property should be sold when the husband desired it, and the debt paid. The property was conveyed by the grantee, pursuant to the direction of the husband, and upon the payment of the debt. The grantee in the second conveyance did not enter into possession of the premises. The latter deed recited a nominal consideration, and the evidence did not disclose what amount, if any, was paid for the premises. Held, that the second conveyance was fraudulent as against the wife, who subsequently purchased the premises at execution sale under a judgment against the husband for separate maintenance.

Starr v. Kaiser, 170.

EVIDENCE OF CONSIDERATION.

6. The evidence in this case is quite satisfactory that full value was given for the property transferred. *Hease v. Barrett*, 202.

GENUINENESS OF CONSIDERATION.

7. Where a son who was indebted to his mother and others transferred a large amount of property to his brother-in-law on condition that he would assume and pay the son's debts, and the brother-in-law thereupon executed his note to the mother for the amount of the son's debt to her, such note represented a *bona fide* debt. *Hease v. Barrett*, 202.

SUFFICIENCY OF CONSIDERATION.

8. Where realty worth \$11,000 was by one who shortly afterward became insolvent transferred to his sister for an expressed consideration of \$11,000, consisting of \$7,500, which was in fact paid, and an agreement to care for the grantor during his life, the inadequacy of consideration was not so great as to shock the conscience of the court, and render the deed void as to creditors. *Brown v. Case*, 221.

INADEQUATE CONSIDERATION DOES NOT MAKE TRANSFER VOLUNTARY.

9. Where a conveyance is made by a grantor who is indebted at the time, upon a valuable consideration that is inadequate, such inadequacy does not render the conveyance voluntary. *Brown v. Case*, 221.

FRAUDULENT CONVEYANCES—CONTINUED.

CONVEYANCE TO RELATIVES—BURDEN OF PROVING GOOD FAITH.

10. Where property is conveyed to a relative under suspicious circumstances, the burden of proof is on the latter to show the good faith of the transaction. *Goodale v. Wheeler*, 190; *Brown v. Case*, 221; *Robson v. Hamilton*, 239.

CONFIDENTIAL RELATIONS OF THE PARTIES.

11. Defendant, while heavily indebted, organized a corporation, the stockholders of which were his wife and sons and two others, who were nominal stockholders only, to which he transferred his property at an excessive valuation, receiving therefor stock and notes of the corporation. The directors of the concern were authorized to issue bonds for the debts of the corporation, and defendant took all the bonds, and applied them as payments on the notes. As president of the corporation he managed all its affairs, and only two meetings of the directors were held. Defendant charged against the company certain sums in favor of his sons for alleged services rendered prior to the organization, and subsequently conveyed property of the corporation to them, charging them therefor on their account with the corporation. The sons conveyed the same to defendant's wife without consideration. *Held*, that the conveyances were void, as in fraud of creditors. *Goodale v. Wheeler*, 190.

EXPECTATION OF BENEFIT TO GRANTOR.

12. Where an insolvent conveyed property to a *bona fide* creditor, receiving credit for the full value thereof, the fact that such debtor expected that such property would be reconveyed to his children—there being no agreement for such reconveyance—did not render the conveyance fraudulent as to the other creditors of such debtor.

Hesse v. Barrett, 202.

PREFERENCE BY INSOLVENT DEBTOR.

13. In Oregon the law is now settled that an insolvent debtor may prefer one creditor over another, if the transfer is to pay or secure an honest debt, and no secret benefit is reserved to the debtor. Transfers to relatives will be closely examined, but are not necessarily void.

Hesse v. Barrett, 202.

GOOD FAITH OF GRANTEE.

14. A grantee in a conveyance from a husband, pending a suit against him by his wife for separate allowance, who had knowledge of the pendency of the action, and who accepted the conveyance without the wife joining therein, cannot claim the premises as an innocent purchaser.

Starr v. Kaiser, 170.

VALIDITY OF FRAUDULENT MORTGAGE AS BETWEEN THE PARTIES.

15. An objection that a mortgage and deed of trust executed by a party is a fraud on his creditors is available only to the latter, and cannot be made by the party himself, it appearing that the instruments themselves had a good consideration. *United States Mortgage Co. v. Marquam*, 391.

IDEM—INNOCENT PURCHASERS.

16. Defendant, while heavily indebted, organized a corporation, the stockholders of which were his wife and sons and two others, who were nominal stockholders only, to which he transferred his property at an excessive valuation, receiving therefor stock and notes of the corporation. He charged against the company certain sums in favor of his sons for alleged services rendered prior to the organization, and subsequently conveyed property of the corporation to them, charging them therefor on their account with the corporation, and such sons conveyed such property to the defendant's wife, without consideration. *Held*, that such sons, having knowledge of the purpose of the organization and attending circumstances, could not claim as innocent purchasers, though the consideration may have been valuable.

Goodale v. Wheeler, 190.

FRAUDULENT CONVEYANCES—CONCLUDED.

REMEDIES OF CREDITORS—EVIDENCE OF FRAUD.

17. A letter from a debtor to a creditor: "If you get in and sue me, it will take the whole place to pay the lawyers with, and you and I will have nothing. You can just do as you please. Either sue me, and be sure of getting nothing, or you can just wait on me, and I will get it when I can,"—and others of similar import, indicated that the execution of a deed twenty-one days later by the debtor of her realty was to put it beyond the reach of her creditors, and were admissible, in a suit to set aside the conveyance, to establish such fraudulent intent.

Robson v. Hamilton, 239.

IDEM—STATEMENTS OF GRANTOR.

18. Where the consideration for a conveyance is being inquired into, a wide latitude should be allowed in the examination of witnesses, for the purpose of determining the amount and value of the consideration alleged to have been paid, and, ordinarily, a mere statement of the debtor that he owed a certain sum will not be conclusive.

Beers v. Aylsworth, 251.

STATEMENTS OF GRANTOR NOT BINDING ON GARNISHEE.

19. In a garnishment proceeding, it being claimed that the transfer of property by the debtor to the garnishee was fraudulent, statements of the debtor concerning the transfer, made a few days before it, are admissible to show the debtor's intent, though not binding on the garnishee, having been made in his absence, unless he had knowledge of them.

Beers v. Aylsworth, 251.

CONTRACT AGAINST PUBLIC POLICY.

20. Plaintiff conveyed her realty to defendant in order that she might take her husband and son out of the state to avoid their being prosecuted for a felony. Defendant deeded the same to her parents to put it beyond the reach of her creditors. Plaintiff thereafter sued on the notes given for the purchase price, and recovered judgment. Held, that plaintiff could have the conveyance made by defendant set aside, in order to enforce her judgment, as it was not necessary for her, in opening her case, to show that she had violated the law; nor did she need the aid of the original transaction to maintain her suit.

Robson v. Hamilton, 239.

FUNDING Debts of Estates. See EXECUTORS AND ADMINISTRATORS, 6.

GOVERNMENT LANDS. Same as PUBLIC LANDS.

GUILTY KNOWLEDGE.

Statutory Crimes—Knowledge as an Element Of. See CRIM. LAW, 6, 7.

HARMLESS ERROR. See APPEAL, 17-25.

HEARSAY EVIDENCE. See EVIDENCE, 16.

HIGHWAYS.

PLATS—DEDICATION OF ROADS SHOWN THEREON.

1. An owner who executes and records a plat of certain land showing thereon lots or tracts divided by or adjoining streets or roads, and sells property with reference to such plat, must be considered as having established and dedicated such roads to public use, regardless of an actual use by the public at large.

Spencer v. Peterson, 257.

EFFECT OF NOT IMPROVING DEDICATED ROADS.

2. Failure of a county or municipality to open or work roads laid out on a plat of land does not defeat the right of the public therein, unless barred by adverse user.

Spencer v. Peterson, 257.

HIGHWAYS—CONCLUDED.**HIGHWAY PETITION—DESCRIPTION OF TERMINUS.**

3. Under Section 4062 of Hill's Ann. Laws, requiring a petition for the location of a county road "to specify the place of beginning, the intermediate points, if any, and the place of termination," such a document is sufficient if from its terms these points can be definitely ascertained; thus, a petition is sufficient when the terminus can be definitely ascertained by following the description from the initial point—and particularly when it can be further fixed by pursuing the last two calls from a given point. It is not necessary that the petition describe each or any point with such exactness or detail that it can be found without referring to any other part of the petition. *Nelson v. Yamhill County*.

HOLDING OVER After Term.

Effect of Continuing in Possession Under a Lease After the End of the Agreed Term. See **LANDLORD AND TENANT**, 3.

HOTEL.

When Use of Land for is Legitimate Railroad Purpose. See **RAILROADS**.

HUSBAND AND WIFE.**REGISTRY OF CHATTEL OWNERSHIP BY MARRIED WOMAN.**

Hill's Ann. Laws, § 3000, providing that personal property not registered by a married woman shall be deemed *prima facie* to be the property of the husband, does not apply to property purchased by her after marriage, or acquired by gift from her husband. *Noblitt v. Durbin*, 555.

IMMUNITIES.

Special Privileges to Particular Classes. See **CONST. LAW**, 1.

IMPEACHMENT.

Examples of the Right to Impeach Witnesses and the Foundation Required Therefor. See **CRIMINAL LAW**, 27-29.

IMPLIED AMENDMENT. See STATUTES, 2-5.**IMPLIED REPEAL. See STATUTES, 6.****IMPROPER REMARKS BEFORE JURY.**

Limits of Permissible Argument of Counsel in a Trial. See **TRIAL**, 4, 5.

INCONSISTENCE

Between Denials and Affirmative Defenses. See **PLEADING**, 4.

INDEMNITY.**SUFFICIENCY OF NOTICE TO INDORSEE AS INDEMNITOR.**

The purchaser of a note sued the maker, who defended on the ground that an indorsement of payment appearing on the note was not genuine, and that without this payment the note was barred by limitation. The seller of the note, who had indorsed without recourse, agreed at the time of the sale to appear as a witness for the purchaser in case he sued on the note, and did so appear, though notified of the pendency of the suit only a few hours before taking the witness stand. She was not asked to assume or assist in the defense. *Held*, that the notice was nevertheless sufficient to make the judgment in the suit binding on her.

Carroll v. Nodine, 412.

INDICTMENT AND INFORMATION.

Sufficient Allegation of Venue. See CRIMINAL LAW, 6.
 Charging Acts Constituting the Offense. See CRIMINAL LAW, 3.
 Assault With Intent to Kill—Alleging Intent. See CRIMINAL LAW, 5.
 Need of Endorsing Thereon Names of the Witnesses Examined Before the Coroner's Jury. See CRIMINAL LAW, 23.
 Aiding Escape of Prisoner—Allegation of Intent—Charging Guilt of the Prisoner. See CRIMINAL LAW, 9, 10.

INFORMATION. See CRIMINAL LAW, 3-10.

INSOLVENCY.

Right of Insolvent to Prefer Creditors. See FRAUD. CONVEY. 13.

INSTRUCTIONS TO JURIES.

Propriety of Refusing Duplicate Instructions. See TRIAL, 9.
 Special Instructions Should be Requested. See TRIAL, 10.
 Instructions Should Relate to the Entire Evidence. See TRIAL, 11.
 Instructions Should be Reasonably Definite. See TRIAL, 12.
 Instructions to Disregard Evidence or Defining the Distinction Between Similar Crimes Must be Clear and Definite. See CRIM. LAW, 15, 34.

INTENT as an Element of Statutory Crimes. See CRIM. LAW, 4.

INTERIOR DEPARTMENT. Action of in Patenting Swamp Land is Conclusive on Everyone. See PUBLIC LANDS.

INTERPLEADER.

INTERPLEADER—APPEAL—SEVERABLE DECREE.

A decree of interpleader is not severable, so as to permit a defendant to appeal from the part discharging plaintiff from liability, leaving its other provisions undisturbed as to the fund paid into court.

New Zealand Insurance Co. v. Smith, 466.

INTOXICATING LIQUORS.

Illegal Sales—Necessity of Guilty Knowledge. See CRIM. LAW, 7.
 Laws, 1891, p. 79, Does Not Amend Sec. 1913 of Code. See STAT. 8.

IRRIGATION.

Prescriptive Right—Title by Relation—Adverse Use. See WATERS.

JOINT TENANCY in Wheat in Warehouse. See TENANTS IN COMMON.

JUDGMENT.

POWER OF COURTS TO VACATE VOID JUDGMENTS.

1. A court rendering a judgment void on its face has the inherent power, even on its own motion, to set the judgment aside at any time.

White v. Ladd, 324.

EFFECT OF FORMER DECISION.

2. An appellate court will not on a second or subsequent appeal revise or reverse its former decisions in a given cause where the facts remain the same.

Stager v. Troy Laundry Co. 141.

ATTACHMENT AND JUDGMENT—RES ADJUDICATA.

3. Where, in a suit begun by attachment, the defendant died before service of summons, and service was thereupon had upon his executor, the jurisdiction of the court depended upon the validity of the attachment, and the judgment ordering the sale was, therefore, not conclusive as to the validity of the seizure of part of the property, merely because the remainder was well attached; but the question of such validity could be raised on motion to confirm the sale.

White v. Ladd, 324.

JUDGMENT—CONCLUDED.

RES ADJUDICATA BY JUDGMENT.

4. Where the question of the sufficiency of the service of an attachment to give jurisdiction over the property seized is raised in an amended complaint, and not controverted, the judgment ordering the sale of the property is conclusive, and the question cannot be raised on objection to the confirmation of the sale. *White v. Ladd*, 324.

FORMER ADJUDICATION AS AN ESTOPPEL.

5. A judgment is conclusive of every fact necessary to uphold it, of all matters actually determined, and, further, of every other matter which the parties might have litigated and settled as incident to and necessarily connected with the subject-matter of the litigation, as either claim or defense, and this rule applies to both trials and defaults.

White v. Ladd, 324.

APPLICATION TO MOTIONS OF THE DOCTRINE OF RES ADJUDICATA.

6. Whatever may have formerly been the rule, the tendency of later cases is to apply the doctrine of *res adjudicata* to decisions upon motions, and to hold that where a point either of law or fact has been necessarily passed upon in deciding a motion that point is settled between the parties and their privies.

White v. Ladd, 324.

COLLATERAL ATTACK ON PROBATE ORDER.

7. Having possession of the personal property of an estate, and having given the notice of distribution designated by statute, and in the manner required, the orders of a county court based thereon cannot be collaterally attacked.

State v. O'Day, 495.

COLLATERAL ATTACK ON ORDER TO MORTGAGE AN ESTATE.

8. An order of a county court authorizing an administrator to mortgage the real property of an estate, based on a verified petition setting forth all the facts required by the statute to exist before such an order can be made, see Laws, 1898, p. 34, § 2, is conclusive, in case it is attacked collaterally, if the county court had jurisdiction to administer the estate, notwithstanding the application for permission to sell was by a petition, while the statute provides that the court may act when certain facts are "shown by affidavit."

Lawrey v. Sterling, 518.

COLLATERAL ATTACK ON AVERMENTS OF THE PETITION.

9. Where the petition by an administrator to borrow money on estate property to pay debts, as authorized by Laws, 1898, p. 34, states facts showing the need of a certain sum, an objection that the record of the court showed that it was unnecessary to borrow so large a sum will not be considered on collateral attack.

Lawrey v. Sterling, 518.

DECREE MUST FOLLOW THE PLEADINGS.

10. Judgments and decrees must follow the pleadings on which they are based, and even a court of equity having jurisdiction cannot grant relief beyond or other than that justified by the pleadings.

Coughanour v. Hutchinson, 419.

PERSONS CONCLUDED BY A MORTGAGE DECREE.

11. Where plaintiff purchased a part of a tract of mortgaged land, but the deed misdescribed the land so that plaintiff had no record title, and on foreclosure the mortgagee dismissed as to him, his interest in the property was not affected by the decree in the foreclosure suit.

Coughanour v. Hutchinson, 419.

JUDICIAL NOTICE of Meaning of Words. See EVIDENCE, 1.

JUDICIAL POWER to Set Aside Judgments. See COURTS, 1.

JUSTICES OF THE PEACE.

NATURE OF TRIAL ON APPEAL FROM JUSTICE'S COURT.

1. The trial *de novo* in the circuit court contemplated by Laws, 1899, pp. 109, 118, §§ 47, 48, providing that on appeal from a justice's court the case shall be tried anew, is a trial on the issues of fact made by the pleadings in the lower court, and the circuit court on appeal has no jurisdiction to entertain a demurrer for a defect curable by judgment, which has already been waived by pleading over. *Byers v. Ferguson*, 77.

JUSTICES' COURTS—RULES OF PRACTICE—REPLEVIN.

2. The rules of procedure in justices' courts being the same as the rules in courts of record since 1899 (Laws, 1899, pp. 109, 111, § 12), and it being the duty of the circuit court on appeal to try the case anew, disregarding irregularities or imperfections in matters of form (Laws, 1899, pp. 109, 118, § 47), a replevin complaint in a justice's court alleging only the venue of the seizure, and being silent as to the venue of the detention, is sufficient after answer and trial, as, applying the rules prevailing in the courts of record, it might be implied from the allegation as to the locality of the taking that the property remained within the county. *Byers v. Ferguson*, 77.

LACHES.

Delay in Claiming Fund—Discretion. See EQUITY, 4.
 Conditions Justifying Such a Defense. See EQUITY, 5.
 Example of Delay Amounting to Laches. See EQUITY, 6.
 Making Such a Defense by Demurrer. See EQUITY, 9.

LANDLORD AND TENANT.

ACTION FOR RENT—EVIDENCE.

1. Defendant, in an action for rent of a wharf, having alleged he agreed to pay for it only so long as he occupied it, may give evidence not only that he was not in the occupancy of it, but that another was, through agreement with plaintiff. *Ladd v. Hawkes*, 247.

RENT—MEASURE OF VALUE OF REPAIRS.

2. The value of repairs in a lease of a wharf, providing the lessor shall pay the lessee the value of repairs if he is not allowed to remove them, is their value as contained in the wharf, and not what the material, if taken out, would sell for. *Ladd v. Hawkes*, 247.

LEASE—EFFECT OF HOLDING OVER.

3. Where there has been a leasing for a year, or for a term of years, and the tenant holds over after the expiration of the term without objection from the landlord, the relation becomes a tenancy from year to year upon the terms and conditions contained in the original lease. *Parker v. Page*, 579.

CONTINUATION OF LEASE—LIABILITY FOR IMPROVEMENTS.

4. Where a lease provided that "in case this lease cannot be continued after the expiration of * * by mutual agreement of the parties thereto, then the improvements * * shall be purchased" by the lessor, the lease was "continued" by the action of the parties in respectively paying and accepting the reserved rent after the expiration of the term limited, and the lessee thereby forfeited his right to be paid for the improvements. *Parker v. Page*, 579.

LARCENY.

Necessity of Clearly Defining to the Jury the Difference Between Two Similar Crimes. See CRIMINAL LAW, 14, 15.
 Instruction as to the Intent of the Taking. See CRIMINAL LAW, 16.
 Presumption From Possession of Stolen Property. See CRIM. LAW, 18.
 Intent of the Taking is the Test of Guilt. See CRIMINAL LAW, 17.

LAWS OF OREGON. Same as OREGON STATUTES.

LEASE.

Right Created by Possession After End Of. See **LAND AND TEN.** 3.
Continuation of Lease—Pay for Improvements. See **LAND AND TEN.**, 4.

LEGISLATIVE POWER to Fill Offices.

Delegation of Constitutional Power Unlawful. See **CONST. LAW**, 4.

LEVY

Of Attachment—Delivery to Occupant—Return. See **ATTACHMENT**, 1.
Of Execution—Posting Notices—Return. See **EXECUTION**, 3.

LIMITATION OF ACTIONS.

USE OF WATER—APPROPRIATION—TITLE BY RELATION.

1. When the appropriation of a water right is initiated by the posting of a notice, the statute of limitations will begin to run at the date of the posting of such notice, but when it is initiated by an actual diversion without a notice, the statute is set in motion on the date of the diversion, provided in both instances that there is an application to a beneficial use within a reasonable time.

Oregon Construction Co. v. Allen Ditch Co. 209.

PRESCRIPTION—WHEN STATUTE OF LIMITATIONS BEGINS.

2. Prescription begins to run from the time one diverts water, though there is not then an actual use thereof, provided there is actual and exclusive possession and control with intent to use it, followed by actual use within a reasonable time.

Oregon Construction Co. v. Allen Ditch Co. 209.

LIVE STOCK.

Limiting Liability by Agreeing to Value. See **CARRIERS**, 4.
Unloading and Fastening in Safe Place. See **CARRIERS**, 1.

LOCAL LAW.

Barber Sunday Law is Not Local. See **STATUTES**, 1.

LOCATING COUNTY ROAD.

Describing Termini in the Petition. See **HIGHWAYS**, 3.

LONG ACCOUNTS.

Compulsory Reference—What are "Long Accounts" Justifying a Reference. See **REFERENCE**, 2.

LOST PAPER.

Efforts to Find—Contents of as Evidence. See **EVIDENCE**, 9.

MANDAMUS.

JURISDICTION AND PROCEEDINGS—DEMURRER.

The question whether an office has been abolished may be determined on appeal from an order sustaining a demurrer to an alternate writ of mandamus to compel the payment of the salary of the official, though the writ alleges that the officer is duly qualified, commissioned, and acting, as the court will take judicial notice of the statute.

Reed v. Dunbar, 509.

MARRIED WOMEN.

Registry of Separate Chattel Property—Statutes. See **HUSB. AND WIFE**.

MASTER AND SERVANT.

CARE REQUIRED OF TERMINAL COMPANY TO ITS EMPLOYEES.

1. A terminal company engaged in receiving and switching cars from railroad companies is not bound to the same degree of care for the safety of its employes as a regular railroad company engaged in general transportation business.

Tucker v. Northern Terminal Co. 82.

MASTER AND SERVANT—CONTINUED.

ELECTRIC LIGHT POLE AS DANGEROUS PLACE TO WORK.

2. A pole carrying electric light wires is not necessarily a dangerous place to work, with reference to the currents, that will depend upon the care exercised at the controller; and it need not be alleged that the workman did not know the place to be dangerous, for it was not so except by the employer's carelessness. *Hough v. Grants Pass Power Co.* 531.

DUTY OF MASTER TO INFORM SERVANT OF SUDDEN DANGER.

3. It is the duty of a master to inform his servant of any sudden danger of which he has knowledge or should be informed, but of which the servant is ignorant, and the employe may rely on the warning and signals usually given in the conduct of the business, and, if the master fails to give these, he is negligent. *Hough v. Grants Pass Power Co.* 531.

ASSUMING RISK OF EMPLOYMENT—EVIDENCE.

4. The evidence was insufficient to sustain a finding that plaintiff had not assumed the risk incident to the employment, the jury being warranted in finding that the dangers were not obvious to a person of his age and experience. *Bowers v. Star Logging Co.* 301.

EXAMPLE OF RISK OF OCCUPATION.

5. A railroad employe was used to coupling flat cars loaded with iron rails, which usually shift in transit. In an action for his death, it appeared that, while thus employed, a flat car was "kicked" toward a loaded car, and, while endeavoring to couple them, he was caught between the projecting rails and the moving car. No one saw the accident, but it occurred before sunset, and his view of the cars was unobstructed, though what his position was before the cars came together was not shown. It was apparent that he must have stooped to avoid the danger at the time of the accident. *Held*, that it was an ordinary risk of his employment, which he had assumed. *Tucker v. Northern Terminal Co.* 82.

DELEGATION OF DUTY BY MASTER.

6. Where a duty is imposed by law on a master with reference to his employes, it cannot be avoided by merely directing another employe to do it; of which rule this case affords an example: An electric lineman was working on dead electric light wires, under the immediate personal supervision of the light company's manager, just before time to start the dynamos in the evening. The manager directed another workman, having a bicycle, to ride past the power house and notify the employes there not to start the current till further notice. This employe negligently failed to reach the power house in time. *Held*, that the duty to give such notice was one personal to the master, and was not discharged by directing the workman to give it, unless he diligently performed his duty. *Hough v. Grants Pass Power Co.* 531.

ACTIONS—ALLEGING ASSUMPTION OF ORDINARY RISK.

7. In an action for the death of an employe, the answer need not allege that he assumed the risk that caused his injury, if the hazard was ordinary. *Tucker v. Northern Terminal Co.* 82.

ACTIONS—PLEADING LACK OF CONTRIBUTORY NEGLIGENCE.

8. In actions for personal injuries it is not necessary to allege or prove lack of contributory negligence by the plaintiff.

Tucker v. Northern Terminal Co. 82.

ACTIONS—ALLEGING ASSUMPTION OF EXTRAORDINARY RISK.

9. In such actions the rule is otherwise, however, as to extraordinary risks, the assumption of which must be pleaded to be available as a defense. *Tucker v. Northern Terminal Co.* 82.

MASTER AND SERVANT—CONTINUED.

ACTIONS—PLEADING NEGLIGENCE OF MASTER.

10. A complaint stating that deceased, who was a lineman and repairer for an electric power company, was, by direction of the manager, working on certain dead wires that needed immediate attention; that it was the duty of the manager to avoid exposing deceased to any unnecessary danger, and to warn him of dangers that might result from a failure of the defendant company to perform its duty; that while deceased was so at work the manager neglected to give any notice at the power house to keep the power off until deceased should be safely out of the way, and failed to warn deceased of danger which was or should have been known to said manager; that in consequence of such neglect the electric current was turned onto the wires on which deceased was working, whereby deceased was killed, alleges the manager's knowledge of the danger, and justified proof that the manager did know the risk.

Hough v. Grants Pass Power Co. 531.

ACTIONS—ALLEGING DUTY TO GIVE WARNING.

11. The complaint was not objectionable because failing to specifically state that it was customary to give notice at the power house that workmen were still employed on the line, it being apparent from the whole complaint that failure to give notice in the customary way was the negligence charged.

Hough v. Grants Pass Power Co. 531.

ACTIONS—ALLEGING IGNORANCE OF DECEASED.

12. A specific allegation that deceased did not know of the danger was unnecessary, for deceased was working on dead wires, which presumably would not be made live wires without notice.

Hough v. Grants Pass Power Co. 531.

ACTIONS—PLEADING AND PROOF.

13. Under a complaint alleging that plaintiff's injuries were caused by the negligent failure to notify defendant's servants at its power house not to turn on the current while plaintiff was working on the electric wires, evidence that it was customary to use a telephone to give such notification, instead of sending a messenger, as defendant did, was admissible; and the testimony as to such custom was not too remote in point of time, because relating to the year previous to the accident.

Hough v. Grants Pass Power Co. 531.

ACTIONS—ADMISSIBILITY OF EVIDENCE.

14. In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train, evidence that the brake had sometimes loosened up because of the dog's flying out of the ratchet while logs were being loaded on the cars, was admissible as tending to support plaintiff's contention that the dog failed to hold, permitting the brake to loosen, whereby he was knocked off his balance.

Boyers v. Star Logging Co. 301.

ACTIONS—SUFFICIENCY OF EVIDENCE.

15. Plaintiff, while attempting to set a brake on defendant's logging train, lost his balance, and was run over and injured. Defendant's servants did not instruct him as to how he should do the work, nor were any of the dangers pointed out. He was about eighteen years of age, and inexperienced. He had set the brake once or twice while the cars were being loaded. When the train was coming to a down grade, a servant of defendant ordered him to set the brake on the car. Plaintiff claimed that the dog failed to hold, permitting the brake to loosen, and knock him off his balance, causing him to fall under the train. Another servant of defendant testified that plaintiff seemed excited, and as he was backing along on the ties he tripped, and fell against the car, and the sand board caught him on the right arm, and rolled him over. *Held*, that the evidence was sufficient to take the case to the jury on the question whether plaintiff was properly warned and instructed as to the dangers of the employment.

Boyers v. Star Logging Co. 301.

MASTER AND SERVANT—CONCLUDED.**INSTRUCTIONS—DEFECTIVE APPLIANCE.**

16. In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train through the dog failing to hold, permitting the brake to loosen, so as to knock him off his balance, a requested instruction that if plaintiff, while attempting to set the brake, slipped and fell, defendant was not liable, was properly modified by adding, "unless such slipping was caused by the defective brake."

Bowers v. Star Logging Co. 301.

MEANDER LINES.

Water Line is Boundary of Meandered Streams. See **BOUNDARIES**, 3.

MEMORANDUM.

Use of by Witness—Striking Out Testimony. See **TRIAL**, 17.

MINES AND MINING.**RECORDING CLAIMS IN UNORGANIZED MINING DISTRICTS.**

Under Rev. Stat. U. S. § 2324, providing that the miners of each mining district may make regulations regarding the recording of claims, etc., and Hill's Ann. Laws, § 3831, providing that, when a mining district has been organized, the claims therein shall be recorded, claims in a locality not an organized district were not required to be recorded.

Peyton v. Burns, 430.

MISCONDUCT of Counsel in Abusive Argument. See **TRIAL**, 4, 5.

MONEY LENT.

History of Use of Account Books as Evidence of Loans by Merchants.

Harmon v. Decker, 593-595.

MORTGAGES.**POSTPONEMENT OR FORFEITURE OF MORTGAGE LIEN.**

1. A mortgagor on the date of the mortgage deeded the property covered thereby, together with certain other property, to a trustee; the latter to take possession and collect the rents and profits, and apply them to the payment of interest and taxes, etc. The trustee was further empowered to lease the property, and to extend the term beyond the maturity of the mortgage, not exceeding one year. The court found that the trustee made two leases extending beyond the maturity of the mortgage, neither of which was at the instance of the mortgagee. *Held*, insufficient to postpone or forfeit the mortgage lien.

United States Mortgage Co. v. Marquam, 391.

PLEADING VIOLATION OF TERMS OF MORTGAGE.

2. A mortgagor on the date of the mortgage deeded the property covered thereby, together with certain other property, to a trustee; the latter to take possession and collect the rents and profits, and apply them to the payment of interest and taxes, etc. The trustee was further empowered to lease the property, and to extend the term beyond the maturity of the mortgage, not exceeding one year. *Held*, that an answer in a suit to foreclose the mortgage, showing that some five leases were executed beyond the time designated, but not showing what rents were stipulated for, or how they were injurious to the mortgagor's reversionary estate, but merely averring that the leases were apparent incumbrances and clouds on the mortgagor's title, was insufficient to show an estoppel, or to require a forfeiture of the mortgage lien.

United States Mortgage Co. v. Marquam, 391.

MORTGAGES—CONTINUED.

FORECLOSURE OF LIEN—RELIEF ON CROSS SUIT.

3. A cross complaint brought against a mortgagor by one of the parties defendant to a suit to foreclose the mortgage may extend to all the property covered by the cross complainant's lien, and need not be confined to the property covered by the original mortgage, for such an answer is really a suit to foreclose such lien, and the party should not be obliged to assert his rights by piecemeal.

United States Mortgage Co. v. Marquam, 391.

FRAUDULENT MORTGAGE—VALIDITY OF AS BETWEEN THE PARTIES.

4. An objection that a mortgage and deed of trust executed by a party is a fraud on his creditors is available only to the latter, and cannot be made by the party himself, it appearing that the instruments themselves had a good consideration. *United States Mortgage Co. v. Marquam*, 391.

MORTGAGE AS CONSTRUCTIVE NOTICE OF UNRECORDED DEED.

5. A mortgage from a stranger to the record title is not constructive notice to an intending purchaser of a prior unrecorded deed.

Advance Thresher Co. v. Esteb, 469.

FORECLOSURE—EFFECT OF OMITTING SUBSEQUENT PURCHASERS.

6. In mortgage foreclosures all persons who have become interested in the property subsequent to the execution of the mortgage should be made parties, and the interests of those of such persons as are not brought in are not affected by the decree. *Coughanour v. Hutchinson*, 419.

DISMISSAL OF FORECLOSURE SUIT AS A RELEASE OF THE MORTGAGE.

7. A part of a tract of mortgaged land was sold to plaintiff, but the deed misdescribed the land so that plaintiff had no record title thereto. The mortgagee, on commencing foreclosure proceedings, made plaintiff a party, but on finding that he had no record title, dismissed as to him. *Held*, not to be a release of any of the mortgagee's rights as to the land conveyed to plaintiff. *Coughanour v. Hutchinson*, 419.

RIGHT OF POSSESSION OF PURCHASER AT MORTGAGE SALE.

8. A purchaser at a sale under a decree of foreclosure of a lien is entitled to retain possession, as against the mortgagor and all persons claiming under him, until the debt is paid.

Coughanour v. Hutchinson, 419.

RIGHT OF PURCHASER OF LEASED PREMISES TO THE RENT.

9. Under Section 307 of Hill's Ann. Laws, providing that a purchaser of land at a judicial or execution sale, from the day of sale until a resale or redemption shall be entitled to the possession, unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be "entitled to receive from the tenants the rents, or the value of the use and occupation thereof, during the same period," a tenant of land sold on foreclosure who is holding under an unexpired lease made by the owner of the property subsequent to the mortgage, must pay to the purchaser thereof, whether the mortgagee or not, the rent, or the value of the use and occupation of the premises, from the day of sale, notwithstanding, in accordance with his lease, he has paid the rent in advance to his lessor. *United States Mortgage Co. v. Willis*, 481.

MORTGAGEE'S NOTICE OF PRIOR EQUITABLE CLAIM.

10. Plaintiffs sued to recover mining property which they had conditionally sold to defendant company under a contract providing that certain improvements should be made. A mortgagee alleged that his mortgage was for money loaned to the company to make the improvements under the provisions of the contract. *Held*, that, if it was loaned for this purpose, the mortgagee must have known of the contract and its conditions, and must therefore have taken subject to plaintiffs' rights thereunder. *Martin v. Eagle Development Co.* 448.

MORTGAGES—CONCLUDED.

NOTE AND MORTGAGE—ANSWER.

11. The answer in a suit to foreclose a mortgage securing a note for the purchase price of certain property, alleging that when the property was bought "it belonged to the E. Co.," and that plaintiff had no interest in it; that the note and mortgage were taken in his name, in trust for said company, and defendant had paid the money due on the note to said company,—is bad, as against demurrer, in not alleging that said company was a corporation or partnership, or was authorized to receive the money, or capable of discharging defendant because of such payments, and in not stating the right of the company to receive the money.

Le Clare v. Thibault, 601.

See EXECUTORS AND ADMINISTRATORS, 3-6.

MOTION

To Acquit—Specification of Reasons. See CRIMINAL LAW, 31.

To Acquit for Insufficiency of Evidence. See CRIMINAL LAW, 30.

Decision on as a Matter Adjudicated. See JUDGMENTS, 6.

MULES. Unloading and Tying to Red Plows. See CARRIERS, 1.

MUNICIPAL CHARTERS. Same as CHARTERS OF CITIES.

MUNICIPAL CORPORATIONS.

STREETS—CHARACTER OF PROCEEDINGS TO IMPROVE.

1. Proceedings not according to the course of the common law, by which the title of property may be divested, must be conducted with at least a full compliance with the statute; and where a special power is granted, and a mode prescribed for its exercise, that mode must be essentially followed or the proceedings will be void. The acts required by the prescribed mode are conditions precedent to a valid exercise of the power conferred.

Bank of Columbia v. Portland, 1.

STREETS—REQUIRED NOTICE OF INTENTION TO IMPROVE.

2. Under a city charter authorizing the common council to improve the streets, and requiring that before any street improvement shall be made the council "shall pass a resolution of intention so to do, and describing the work or improvement" (Portland Charter, 1898, §§ 127, 128; Laws, 1898, pp. 101, 150, 151, §§ 127, 128), a resolution "that notice be given that the Common Council of the City of Portland propose to improve" certain streets, followed by a specification of how the work should be done, is a sufficient though not very lucid resolution of intention to improve.

Bank of Columbia v. Portland, 1.

STREETS—PUBLISHED NOTICE OF PROPOSED IMPROVEMENT.

3. Under a city charter prescribing that before any street improvement shall be made the resolution declaring the intention to improve shall be published, etc. (Portland Charter, 1898, § 128; Laws, 1898, pp. 101, 150, § 128), a publication: "Notice is hereby given that the Common Council of the City of Portland propose to improve" stated streets in a specified manner is sufficient.

Bank of Columbia v. Portland, 1.

STREETS—POSTED NOTICES OF PROPOSED IMPROVEMENT.

4. Under a statute requiring a certain notice to be posted in a specified place, "headed in letters not less than" a prescribed size, the letters used in the heading absolutely must be at least as large as the size required, or jurisdiction will not be acquired to proceed: for example, under the 1898 charter of Portland, § 128, providing that the city engineer shall post notices, headed, "Notice of Street Work," in letters of not less than an inch in length, a notice headed "Notice of Street Work," in three-quarter inch type, is insufficient to confer upon the council jurisdiction to make the proposed improvements.

Bank of Columbia v. Portland, 1.

MUNICIPAL CORPORATIONS—CONTINUED.

STREETS—REMONSTRANCE NOT A WAIVER.

5. The filing of remonstrances by abutting property owners against a proposed street improvement does not constitute a waiver of the requirements of the city charter with respect to the manner and form of giving of notices of the proposed improvement, such requirements being conditions precedent to the city's jurisdiction to lawfully make the improvement. *Bank of Columbia v. Portland*, 1.

CITY ENGINEER—POWERS OF DEPUTY.

6. Where a city charter provided for a city engineer and deputies clothed with the powers of the engineer, a deputy engineer posting notices of a proposed street improvement required to be posted by the city engineer may make the required affidavit of such posting; and may, under appropriate circumstances, amend a return to make it speak the truth. *Bank of Columbia v. Portland*, 1.

PUBLICATION OF NOTICE CONSECUTIVELY.

7. Portland City Charter, § 128 (Laws, 1898, p. 150), requires the publication of the council's resolution of an intention to make certain street improvements in a daily paper for "ten consecutive days." Laws, 1899, p. 233, provides that, where a notice is required by law to be published in a daily paper for consecutive days, it shall be a compliance if such notice is published on the week days only. *Held*, that the publication of a notice of a proposed street improvement in each successive issue from May 4th to and including May 15th in a paper issued every day except Sunday is sufficient. *Bank of Columbia v. Portland*, 1.

ACTION AGAINST A CITY—NEED OF HAVING CLAIM AUDITED.

8. Where the statute provides that claims against a city must be presented for audit, such a presentation is absolutely necessary before an action can be maintained on the claim—and a complaint in an action against a city for goods sold which fails to allege that plaintiff presented his account to the city recorder to be audited, as required, is fatally defective, even after verdict. *Philomath v. Ingte*, 289.

INVALID STREET ASSESSMENTS—APPLICATION OF CURATIVE ACT.

9. Under Section 156 of the Portland Charter of 1898 (Laws, 1898, pp. 101, 163, § 156), providing that if, upon the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied are adjudged to be invalid because of defects, the city can bring actions against the owners of abutting property and recover the cost of such improvement properly chargeable thereunder, a void assessment is not cured, ratified, or confirmed, in the absence of an adjudication that the assessment is invalid. *Oregon Real Estate Co. v. Gambell*, 61.

VOID SALE OF LAND CONDEMNED FOR STREETS.

10. Where an owner of property, a part of which had been condemned for a street, had been awarded damages in excess of benefits, a sale of an uncondemned part of such property for an assessment for the improvement was void. *Gaston v. Portland*, 373.

ESTOPPEL BY ACCEPTING BENEFITS—OPENING STREETS.

11. Property had been condemned for a street, and damages awarded the owner in excess of benefits to abutting property. A part of the latter property was illegally sold for a benefit assessment, and warrants drawn in favor of the owner on the fund created by this sale and other assessments for the amount of her damages. *Held*, that the owner could accept her award out of the fund created, without impairing her remedy for the recovery of the property wrongfully sold. *Gaston v. Portland*, 373.

MUNICIPAL CORPORATIONS—CONCLUDED.

EFFECT OF ERROR IN WARRANT TO PAY FOR CONDEMNED LAND.

12. Under Laws, 1898, p. 147, § 117, which provides that as soon as the appropriation to pay the assessed damages shall be in the city treasury, subject to the warrants in favor of the owners of condemned property, and the warrants drawn and ready for delivery, private property shall be deemed appropriated for street purposes, and not otherwise, an error in drawing warrants in favor of a property owner for an amount greater than that to which she was entitled did not nullify the entire proceedings, so as to prevent the appropriation of the property, as her rights had been fully protected, and she could take so much of the fund as she was entitled to.

Gaston v. Portland, 373.

VOID SALE FOR BENEFITS OF STREETS—DAMAGES—INJUNCTION.

13. Where a sale of property for an assessment for the opening of a street has been at the suit of the owner declared void, she cannot, in a subsequent suit to enjoin the opening the street on the ground of illegality of the proceedings, recover her expenditures in having the sale declared void.

Gaston v. Portland, 373.

NATIONAL BANKS.

Authority to Levy Assessments on Stockholders. See BANKS, 1.

NEGLIGENCE.

ELECTRIC WIRES—RES IPSA LOQUITUR.

1. The fact that injury has resulted from a broken and fallen live electric wire is enough, under the doctrine of *res ipsa loquitur*, to raise a disputable presumption of negligence on the part of the owner of the wire, relieving plaintiff from showing further facts, and excluding the presumption that it was not due to defendant's negligence.

Chapron v. Portland Electric Co. 39.

ELECTRIC WIRES—INJURY—INSTRUCTION ON RES IPSA LOQUITUR.

2. In an action against an electric light company for injuries received from contact with a broken live wire, where the complaint alleged that the wire was weak and defective and improperly strung, an instruction that if it was proved that the accident was caused by the breaking of the wire the law presumed negligence, requiring defendant to show by preponderance of the evidence that it was not at fault, was not erroneous as permitting the jury to find negligence on grounds not charged, when the jury were told that plaintiff could only recover on the negligence alleged, and that the undisputed evidence of defendant raised the presumption that the wire was sufficient in size and quality, and that it would be necessary to find, in order to find for plaintiff, that the stringing of the wire was negligently done, or that it was negligently allowed to get out of its place.

Boyd v. Portland Electric Co. 336.

PLEADING—ALLEGATION OF NEGLIGENCE.

3. A complaint in an action for injuries sustained by reason of defendant's negligence is sufficient when it specifies the particular act which caused the injury, together with a general allegation that such act was negligently done; for the word "negligence," when applied to such an act, is a statement of an ultimate fact, and renders the act actionable.

Chapron v. Portland Electric Co. 39.

PLEADING—ALLEGING MAINTENANCE OF BROKEN WIRE.

4. A complaint in an action for injury to a horse and vehicle through a broken wire, charged with electricity, suspended over a street, which alleges that defendant negligently permitted such wire to become and remain broken on the street, is not bad for failing to allege that the wire also struck the horse by reason of defendant's negligence.

Chapron v. Portland Electric Co. 39.

NEGLIGENCE—CONCLUDED.

PLEADING CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

5. In actions for personal injuries it is not necessary to allege or prove lack of contributory negligence by the plaintiff.

Tucker v. Northern Terminal Co. 82.

PERSONAL INJURY FROM BROKEN WIRE—EVIDENCE OF NEGLIGENCE.

6. Sometimes a court will be justified in directing a verdict for defendant at the close of the testimony because it appears that there has been no negligence: but where the plaintiff's evidence tends by more than inference to show negligence, the case must go to the jury; thus, for example, where a person injured by contact with a broken live electric wire, charged that the wires were weak and improperly strung, and showed that in a wind of not unusual velocity a wire broke from its fastening and burned through another wire, the ends of which fell across a public street and injured plaintiff, there is more than an inference of negligence, there is affirmative evidence of an improper construction of the line, requiring the consideration of the jury.

Boyd v. Portland Electric Co. 336.

See, also, MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS. Same as BILLS AND NOTES.

NEWSPAPERS.

TERM "NEWSPAPER" CONSIDERED.

1. A weekly paper having a circulation through the mails, by delivery and by news stands of from 1,000 to 1,100 copies and not confined to any particular class or sect of individuals, sensational in its tone, containing the sporting news, some news of general interest, and many advertisements of a business nature, is a newspaper within the purview of Hill's Ann. Laws, § 291, requiring notice of an execution sale to be published in some "newspaper." *United States Mortgage Co. v. Marquam*, 391.

EXECUTION SALE—EVIDENCE OF BEING A SUNDAY PAPER.

2. A paper denominated the "Sunday Welcome," issued on Saturday of each week between 1 and 4 o'clock in the afternoon, and delivered to subscribers on that day, notwithstanding its name, is not a Sunday publication in a legal sense.

United States Mortgage Co. v. Marquam. 391.

NEW TRIAL.

VERDICT THE RESULT OF PREJUDICE.

In a personal injury action against a corporation, the jury returned to the court room after the case was submitted to them, and stated that they understood that some time ago the "old company sold its interest to the new company," and they desired to know which of them would be responsible. The court stated that there was no evidence of any other company than the present defendant, and that the court knew of no other. The defendant was in fact what the jury referred to as the "new company," and was composed of nonresidents, while the former company was a local concern. *Held*, that the verdict could not be set aside on the ground that the personnel of defendant influenced the jury.

Hough v. Grants Pass Power Co. 531.

NONSUIT.

Motion for Involuntary Nonsuit. See TRIAL, 6.

NOTES. Same as BILLS AND NOTES.

NOTICE

Of Street Improvements—Requirements as to Posting and Publishing—Size of Letters. See MUNICIPAL CORPORATIONS, 2, 3, 4.
 Certificate of Levy of an Execution as Notice of the Existence of a Prior Unrecorded Deed. See VENDOR AND PURCHASER, 6.
 Quitclaim Deed as Notice of Secret Equities. See VEND. AND PUR. 7.
 Notice of Equitable Title—Burden of Proof. See EVIDENCE, 6.
 Of Appeal—Extending Time for Filing. See APPEAL, 6, 7.
 To Indorse to Defend Action on Note. See BILLS AND NOTES, 3.

MEANING OF CONSECUTIVE PUBLICATION—STATUTES.

Under the provision of the act of 1899, relating to publication of notices (Laws, 1899, p. 233, § 1), a publication is "consecutive" if it is published on successive days, Sundays excepted: thus, a notice required to be published for ten consecutive days in a daily paper is sufficiently published when it has appeared in each successive issue from the fourth to the fifteenth of a month in a paper issued every day except Sunday.

Bank of Columbia v. Portland, 1.

NOTICE OF APPEAL.

Clerical Mistake in Giving Date of Judgment Not Fatal. See APP. 13.
 Must be Filed Within Time Fixed by Statute. See APPEAL, 6.

OBJECTION NOT MADE IN TRIAL COURT. See APPEAL, 4.

OFFICERS.

POWERS OF DEPUTY OFFICER—AMENDING RETURN.

Where a city charter provided for a city engineer and deputies clothed with the powers of the engineer, a deputy engineer posting notices of a proposed street improvement required to be posted by the city engineer may make the required affidavit of such posting; and may, under appropriate circumstances, amend a return to make it speak the truth.

Bank of Columbia v. Portland, 1.

OFFSET. Same as SETOFF AND COUNTERCLAIM.

OPINION EVIDENCE.

Competency of Witness Familiar With Subject. See EVIDENCE, 27.
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OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OREGON STATUTES. Same as STATUTES OF OREGON.

OVERFLOWED LAND. See PUBLIC LANDS.

PAROL EVIDENCE

To Show Condition of an Indorsement Without Recourse. See *Ev. 24*.
 To Show Contents of Judicial Record. See *EVIDENCE, 8*.

PARTIES.

NUMEROUS PLAINTIFFS—SUIT BY PART ON BEHALF OF ALL.

1. Ten out of a hundred persons jointly interested in a fund cannot bring a suit on behalf of all, under Section 385 of Hill's Ann. Laws, to recover and distribute such fund, where as many as thirty-four of the interested parties state in court that they are not willing to contribute to the expense of the suit. To such a suit all those entitled to share in the fund are necessary parties, and should be brought in as plaintiffs or defendants. *Tobin v. Portland Mills Co. 269.*

PLEADING—DEFECT OF PARTIES—WAIVER BY ANSWER.

2. That a bill by an administrator to foreclose the equitable interest in lands sold by his intestate does not make the heirs of the intestate parties is not an objection after answer, the administrator alleging his readiness to furnish a good and sufficient deed.

Wollenberg v. Rose, 314.

PARTITION FENCES. See FENCES.

PARTNERSHIP.**RIGHTS OF A SILENT PARTNER—PRIORITY OF CREDITORS.**

A dormant partner will not be permitted to claim any part of the partnership property until creditors who did not know of his interest have been paid; as, for example, one who had a secret agreement with a company, by which he was to be a partner with it so far as the substructure of a certain bridge was concerned, but who acted ostensibly as an employe and agent of the company in superintending such substructure and in ordering materials and making contracts for it, the construction contract being an entire one, and in the name of the company, is estopped, as against the creditors of the company, from denying that it alone was interested in the contract; and his secret contract of partnership in the substructure work did not vest him with any title as against such creditors in the money due for the construction of the bridge.

Willard v. Bullen, 25.

PART PERFORMANCE.

Nature of Required to Avoid the Statute of Frauds—Fraudulent Intent is Immaterial. See **STATUTE OF FRAUDS**.

PERSONAL INJURIES.

Actions—Necessity for Plaintiff to Allege Want of Contributory Negligence. See **NEGLIGENCE**, 5.

PERSONAL PROPERTY.

Statements of Possessor of as to Ownership. See **EVIDENCE**, 13.

PHILOMATH Charter, 1809. See **CHARTERS OF CITIES**.

PHRASES. Same as **WORDS AND PHRASES**.

PLAT. Same as **DEDICATION**.

PLEADING.**COMPLAINT—ALLEGATION OF FACTS NECESSARY.**

1. A mortgagor on the date of the mortgage deeded the property covered thereby, together with certain other property, to a trustee; the latter to take possession and collect the rents and profits, and apply them to the payment of interest and taxes, etc. The trustee was further empowered to lease the property, and to extend the term beyond the maturity of the mortgage, not exceeding one year. *Held*, that an answer in a suit to foreclose the mortgage, showing that some five leases were executed beyond the time designated, but not showing what rents were stipulated for, or how they were injurious to the mortgagor's reversionary estate, but merely averring that the leases were apparent incumbrances and clouds on the mortgagor's title, was insufficient to show an estoppel, or to require a forfeiture of the mortgage lien.

United States Mortgage Co. v. Marquam, 391.

COMPLAINT—RULE IN ALLEGING NEGLIGENCE.

2. A complaint in an action for injuries sustained by reason of defendant's negligence is sufficient when it specifies the particular act which caused the injury, together with a general allegation that such act was negligently done; for the word "negligence," when applied to such an act, is a statement of an ultimate fact, and renders the act actionable.

Chapron v. Portland Electric Co. 39.

ANSWER—TENDER AS AN ADMISSION OF LIABILITY.

3. The fact that a party or his attorney admits in court a liability to defendant, or makes a tender of a definite sum, is not sufficient to justify a judgment for plaintiff, unless the pleadings show a cause of action—a judgment must rest finally on the pleadings.

Philomath v. Ingle, 289.

PLEADING—CONTINUED.

ANSWER—INCONSISTENT DENIALS AND DEFENSES.

4. Under the established rule that where denials and affirmative defenses are inconsistent, the defenses are taken as true. An allegation in the answer, in an action against a corporation on a note alleged to have been executed by the corporation, that the note was executed and delivered as alleged in the complaint, in pursuance of a fraudulent conspiracy between plaintiff and an officer of the corporation, is an admission that the officer executing the note had authority to do so, and precludes the corporation from urging the defense of his want of authority, though it is also alleged in the answer. *Baines v. Coos Bay Navigation Co.* 135.

ANSWER—FORECLOSURE OF LIEN—RELIEF ON CROSS SUIT.

5. A cross complaint brought against a mortgagor by one of the parties defendant to a suit to foreclose the mortgage may extend to all the property covered by the cross complainant's lien, and need not be confined to the property covered by the original mortgage, for such an answer is really a suit to foreclose such lien, and the party should not be obliged to assert his rights by piecemeal.

United States Mortgage Co. v. Marquam, 391.

ANSWER—REQUISITES OF A STATEMENT OF COUNTERCLAIM.

6. An answer which is intended to contain a counterclaim must state a cause of action or suit against the plaintiff and in favor of the pleader, and the omission of a material averment will be fatal; for instance, a suit having been brought to foreclose a mortgage securing a note, a plea of counterclaim alleging fraud in the sale on which the note was based, and a subsequent misappropriation of funds by plaintiff as defendant's agent, is not good because it does not show that any damage resulted from the fraud, or that any accounting has been demanded of plaintiff and refused.

Le Clare v. Thibault, 601.

ANSWER—SEPARATE STATEMENT OF COUNTERCLAIM.

7. Under Hill's Ann. Laws, § 73, subd. 1, providing that each defense and counterclaim shall be separately stated, a counterclaim is not well pleaded where joined with the other parts of the defense.

Le Clare v. Thibault, 601.

ANSWER—COUNTERCLAIM—ADMITTING PLAINTIFF'S DEMAND.

8. In pleading a counterclaim there must be something to claim against, so that of necessity the demand of plaintiff must be at least partially admitted.

Le Clare v. Thibault, 601.

DEMURRER—SEVERAL CAUSES OF ACTION.

9. Where a complaint in a personal injury action alleges negligence on more than one ground, it is good against a general demurrer if one of such grounds is sufficiently stated, though another is not.

Hough v. Grants Pass Power Co. 531.

VARIANCE BETWEEN ALLEGATIONS AND PROOFS.

10. There is a fatal variance between a claim against a common carrier on its common-law liability and proof of a contract of carriage limiting the liability for loss.

Normile v. Oregon Navigation Co. 177.

TRIAL—ALLEGATIONS AND PROOFS.

11. Proofs must follow and support the allegations of the pleadings—a plaintiff will not be permitted to sue defendant for a violation of its duty as a common carrier, and recover for some neglect of its duty as a warehouseman, for example.

Normile v. Oregon Navigation Co. 177.

WAIVER—ERROR CURED BY PLEADING OVER.

12. A complaint in a replevin action should state where the property is detained as well as where it was taken, but an omission to so state is not a fatal defect after an answer has been filed and judgment has been entered.

Byers v. Ferguson, 77.

PLEADING—CONCLUDED.

EQUITABLE CROSS BILL—WAIVER BY ANSWERING.

13. A demurrer to an equitable cross bill in a law action is waived by answering, and it cannot afterward be insisted that the cause should have been tried in the law forum. *Wollenberg v. Rose*, 314.

AIDER OF DEFECTIVE COMPLAINT BY VERDICT.

14. A verdict will aid an informal statement of facts in a pleading, but cannot supply an omitted material averment going to the gist of the action. *Philomath v. Ingle*, 289.

AIDER OF INFORMAL COMPLAINT BY VERDICT.

15. Where, in an action against a bank, the answer alleged that from time to time defendant rendered to plaintiff itemized statements of his account, and that he made no objection thereto, but acquiesced therein, and to each and every item thereof, and states the balance shown by such statements, such allegations are sufficient, after verdict, as allegations of an account stated. *Nodine v. First National Bank*, 386.

See CORPORATIONS, 2, 3; ELECTRICITY, 8; EQUITY, 7-10;

FRAUD, 1, 4; MASTER AND SERVANT, 7-13; NEGLIGENCE, 3-5; PARTIES, 1, 2; REPLEVIN, 2.

PLEDGE of Corporate Stock.

Nature of the Transaction—Right of Stockholders to Contribution
When the Corporation has Taken Its Own Stock as Collateral—
Defense of Fraud in Original Issue of Stock. See CORP. 1, 2, 3.

PORTLAND CHARTER. See CHARTERS OF CITIES.

POWER OF COURT

To Extend Time to File a Notice of Appeal. See APPEAL, 7.

To Vacate a Void Judgment After the Term. See COURTS, 1.

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Of Validity of Attachment Proceedings. See ATTACHMENT, 3.

As to Verity of Record in Supreme Court. See APPEAL, 26.

PRINCIPAL AND AGENT.

EVIDENCE OF AGENT AFTER TERMINATION OF AGENCY.

1. In an action against a municipal corporation for injuries from a defective sidewalk, statements by an ex-councilman as to what knowledge he had of the defect while a member of the city council were not admissible, as he could not bind the city after the termination of his term.

Adkins v. Monmouth, 286.

ACTION FOR CONVERSION BY AGENT—TROVER.

2. Where an agent's contract of employment requires him to turn over to his principal the identical moneys collected in the course of his employment, trover may be maintained by the principal against him for the conversion of moneys collected.

Salem Traction Co. v. Anson, 562.

ACTION FOR CONVERSION BY AGENT—EVIDENCE.

3. The evidence in this case on the question of the conversion of the employer's funds by the agent certainly tended to support the findings of the court.

Salem Traction Co. v. Anson, 562.

PRIVATE BOOKS of Account.

Competency and Effect of as Evidence. See EVIDENCE, 17-21.

PRIVILEGES and Immunities. See CONSTITUTIONAL LAW, 1.

PRIVITY.

Relation Between Appropriators of Water and a Corporation Organized to Distribute it Among Them. See WATERS, 1.

Common Interest Among Successive Holders. See ADV. POSS. 1.

PROBABLE CAUSE.

Granting of a Certificate of Probable Cause for Appeal by a Justice of the Supreme Court. See CRIMINAL LAW, 1, 2.

PROBATE COURTS.

Exclusive Power of Over Distribution of Estates. See COURTS, 3.

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PRONOUNCING SENTENCE. See CRIMINAL LAW, 35.

PROSECUTING ATTORNEYS. Same as DISTRICT ATTORNEYS.

PROVINCE OF COURT AND JURY in Civil Actions.

See CARRIERS, 1; ELECTRICITY, 1-4; MASTER AND SERVANT, 15.

PUBLIC LANDS.

SWAMP LANDS—WHEN TITLE PASSES FROM THE GOVERNMENT.

1. The grant by the United States to certain states under the swamp land act was not a grant *in praesenti* of the land listed as in said act provided, but the listing is only a step toward transferring the title, and until the issuance of the patent the legal title remains in the general government, and its action in conveying the title is absolutely and finally conclusive against the world.

Small v. Lutz, 570.

PUBLIC LANDS—HOMESTEAD ENTRY—DEED FROM STATE.

2. A determination by the Secretary of the Interior on an application for a patent, that the lands applied for were subject to homestead entry is conclusive as against one to whom the land had previously been conveyed by the state under a list of swamp lands the approval of which had been revoked after such conveyance and without notice to the grantee therein.

Small v. Lutz, 570.

PUBLIC OFFICERS.

Power of Deputy City Engineer to Make and Amend Returns of Posting of Required Notices. See MUNICIPAL CORPORATIONS, 6.
Fees of District Attorneys in Divorces Since 1899. See DIST. ATTYS.

PUBLIC PLACES.

Necessity of Describing in Sheriff's Return. See EXECUTIONS, 2.

PUBLIC POLICY.

Showing Void Contract to Support Suit. See FRAUD. CONVEY. 20.
Allowing Carriers to Contract Against Negligence. See CARRIERS, 3.

PUBLIC SURVEYS.

Meander Lines as Boundaries. See BOUNDARIES, 3.

QUESTIONS NOT RAISED IN TRIAL COURT. See APPEAL, 4.

QUIETING TITLE.

JURISDICTION OF EQUITY—DISPUTE AS TO BOUNDARY.

1. In a suit in form to quiet title, plaintiff, who was a riparian owner, alleged that there was between the meander line and the line of high water a strip of land not in possession of another, and to which, as riparian owner, he had title. The answer alleged that the meander line and the line of ordinary high water coincided, and defendant claimed the land between high and low-water marks. *Held*, that, the dispute not being one as to the location of a boundary, but as to whether there was any upland between the meander line and the line of high water, a contention that the controversy was as to the true location of a boundary line, and triable at law, was without merit.

Johnson v. Tomlinson, 198.

EVIDENCE AS TO COINCIDENCE OF MEANDER AND HIGH-WATER LINES.

2. On an issue whether the ordinary high-water line of a stream and the meander line as run on the ground coincided, *held*, that the evidence showed a body of land between the meander line and the line of ordinary high water.

Johnson v. Tomlinson, 198.

RAILROADS.

GRANT FOR LEGITIMATE RAILROAD PURPOSES.

1. Land used for a railroad hotel and eating house may be for "legitimate railroad and depot purposes"; whether it is or not will depend upon a variety of conditions and circumstances, important among which is the good faith of the railroad company in so using the property as an incident to the operation of the road, and where such use is in good faith the courts will hesitate about disturbing it.

Abraham v. Oregon & California Railroad Co. 550.

IDEM—FACTS IN EVIDENCE.

2. The station where the land was situated was a small one, at which a large force of men necessarily made their headquarters, and where freight and delayed passenger trains were accustomed to stop for meals, though no passenger trains stopped regularly for such purpose. There was no other station where employes or passengers could be accommodated with meals nearer than thirty-five miles. *Held*, that the construction of the hotel and eating house on the land was a use of it for a legitimate railroad purpose.

Abraham v. Oregon & California Railroad Co. 550.

RAILROADS—CONCLUDED.

IDEM—ACCOMMODATIONS TO THE PUBLIC.

3. Where land is granted to a railroad company "for all legitimate railroad and depot purposes," and a hotel and eating house is erected on the land as an incident to the operation of the road, the fact that accommodations are granted the general public apart from strictly railroad business does not render the use of the land repugnant to the grant; nor is the question affected by the fact that there is a public hotel near by ample to accommodate the passengers and railroad employees.

Abraham v. Oregon & California Railroad Co. 550.

See, also, **CARRIERS.**

RAPE.

Degree of Resistance Required of Prosecutrix. See **CRIM. LAW**, 12.
Sufficiency of Evidence of Penetration. See **CRIM. LAW**, 13.

REDIRECT EXAMINATION.

Explaining Points Developed on Cross-Examination. See **WIT.** 1, 2.

REFEREE'S REPORT.

Effect of Before Supreme Court in Equity. See **APPEAL**, 22.

REFERENCE.

RIGHT OF REFERENCE.

1. Hill's Ann. Laws, § 222, subd. 1, providing that the court may upon the application of either party, or upon its own motion, direct a reference, "when a trial of an issue of fact shall require the examination of a long account on either side," is not an infringement of the right of trial by jury, and is applicable to actions in either tort or contract.

Salem Traction Co. v. Anson, 562.

WHAT ARE LONG ACCOUNTS—DISCRETION OF TRIAL COURT.

2. Where it fairly appears by affidavit, or upon the face of the pleadings, that so many separate and distinct items will be litigated or examined that a jury cannot keep the evidence in mind in regard to each item, the case may be referred, whether the parties consent or object; and the action of the trial court in the matter will not ordinarily be disturbed.

Salem Traction Co. v. Anson, 562.

REFORMATION OF INSTRUMENTS.

EVIDENCE TO JUSTIFY REFORMATION OF A DEED.

The undisputed evidence as to the mutual mistake alleged in the complaint was quite sufficient to justify a reformation of the deed in question.

Coughanour v. Hutchinson, 419.

See **BOUNDARIES**, 2.

REFRESHING MEMORY.

Striking Out Testimony Because Witness Referred to a Written Memorandum. See **TRIAL**, 17.

RELATION.

Date From Which to Compute Water Rights. See **WATERS**, 3, 4.

REMEDY AT LAW. See **EQUITY**, 2, 3.

REPEAL by Implication. See **STATUTES**, 6.

REPLEVIN.**MEANING OF WORD "DISTRAIN."**

1. The meaning of the word "distrained" as used in Hill's Ann. Laws, § 42, subd. 2, designating the venue of actions for the recovery of personal property "distrained for any cause," is a holding of the personal property of another for any purpose or for any cause.

Byers v. Ferguson, 77.

VENUE IN REPLEVIN—ERROR CURED BY PLEADING OVER.

2. A complaint in a replevin action should state where the property is detained as well as where it was taken, but an omission to so state is not a fatal defect after an answer has been filed and judgment has been entered.

Byers v. Ferguson, 77.

RES ADJUDICATA. See **JUDGMENTS**, 3, 4, 5, 6.

RES GESTAE. See **EVIDENCE**, 7.

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RETURN of Service of Paper.

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REVISED STATUTES OF THE UNITED STATES.

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Boundary Line of Meandered Stream. See **BOUNDARIES**, 3.

RISK OF EMPLOYMENT. See **MASTER AND SERVANT**, 4, 5.

ROADS.

Effect of Dedication by Recording Plat. See **DEDICATION**, 1.

Effect of Not Improving or Using. See **HIGHWAYS**, 2.

Description of Terminus in Petition. See **HIGHWAYS**, 3.

RULES OF COURT.**ABANDONED APPEAL—AFFIRMING JUDGMENT ON MOTION.**

Under Rule 14 of the Supreme Court, providing that, if the appellant abandon his appeal, the opposite party, by presenting certain parts of the record to the supreme court, may have the judgment affirmed on motion, a judgment from which an appeal has been taken may be affirmed for abandonment, on motion, where the surety on the undertaking refuses to justify within the required time, and no transcript has been filed in the supreme court. *United States Trust Co. v. Marquam*, 271.

SALES.**REMEDIES OF SELLER—ACTION FOR DAMAGES—FINDINGS.**

1. It is a rule now well established in Oregon that where a law action is tried to a court without a jury findings of fact must be made on all material issues, otherwise the judgment cannot stand: as an example, in an action to recover for a monument contracted to be delivered by plaintiff to defendant, plaintiff is not entitled to recover as for a breach of the contract, without a finding that the monument was of the kind called for by the contract, or that it was such as defendant was bound to accept, whether the contract be treated as one of sale, or for work and skill and the materials upon which they are bestowed.

Wright v. Ramp, 285.

SALES—CONCLUDED.

DEPOSIT WITH WAREHOUSEMAN—BAILMENT—SALE.

2. Where owners of wheat delivered it to a warehouseman, receiving either warehouse receipts reciting the receipt of wheat subject to warehouse charges, and stored at owner's risk, or load checks reciting the receipt of wheat stored at owner's risk unless specially insured,—the owners expecting either to sell to the warehouseman, or secure the return of a like quantity and quality of wheat upon demand and payment of the storage charges,—the deposits were not sales, and did not pass title to the warehouseman. *Tobin v. Portland Mills Co.* 269.

SCHOOLS AND SCHOOL DISTRICTS.

SCHOOL DISTRICT—CHANGING BOUNDARIES—STATUTES.

1. Laws, 1899, pp. 269, 216, § 19, subd. 1, creates a District Boundary Board, which is given power to make alterations and changes in the boundaries of school districts when petitioned to do so "in the manner hereinafter specified." No manner of petitioning the board is prescribed by the statute. *Held*, that, construed in the light of the former statute (Hill's Ann. Laws, § 2590, subd. 3), the phrase, "in the manner herein-after specified," should be regarded, not as surplusage, but as modifying "petitioned," and, as no manner of petitioning is specified, the board is without authority to make changes in boundaries. The mode of exercising the power conferred was intended to be its measure, and, there being no mode, there is practically no power. *School District v. Palmer*, 485.

IMPLIED POWER OF STATE LAND BOARD.

2. The State Land Board, which is authorized to loan the irreducible school fund, may assign a promissory note and a mortgage given to secure it, though such power of assignment is not expressly conferred by statute. *Lawrey v. Sterling*, 518.

SECONDARY EVIDENCE of Contents of Lost Paper. See EVIDENCE, 9.

SECRETARY OF THE INTERIOR.

Right of to Cancel Approved List of Swamp Lands—Requirement of Notice—Conclusiveness of Decision Of. See PUBLIC LANDS, 1, 2.

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SET-OFF AND COUNTERCLAIM.

SUIT TO FORECLOSE MORTGAGE—EQUITABLE COUNTERCLAIM.

1. An answer in a suit to foreclose a mortgage securing a note for the price of an interest in a mine alleging that plaintiff made an agreement to purchase, at the lowest price, such interest for defendant; that subsequently plaintiff falsely represented that he was the owner of an interest therein, which had cost \$2,500, when he had paid only \$2,165 therefor, and defendant, relying thereon, purchased the interest for \$2,500, giving the note and mortgage as part payment; that defendant sent money to operate the mine, but plaintiff converted part of it to his own use, falsely representing that he had used it for expenses,—does not state a counterclaim in equity under Hill's Ann. Laws, § 73, as modified by section 303; the only matter alleged which is at all connected with the contract on which the suit is founded, and the subject of the suit, the note and mortgage, being misrepresentation as to the cost of the interest in the mine, which it is not reasonable to suppose defendant had in contemplation when executing the note. *Le Clare v. Thibault*, 601.

COUNTERCLAIMS AVAILABLE AS OFFSETS IN EQUITY.

2. Counterclaims arising in a different right from the cause of complaint will sometimes be allowed in equity, under unusual circumstances. *Le Clare v. Thibault*, 601.

COUNTERCLAIM FOUNDED ON TORT.

3. A counterclaim may be based on a breach of the contract sued on, though the breach amount to a tort. *Le Clare v. Thibault*, 601.

EQUITABLE SET-OFF AGAINST AN INSOLVENT.

4. The insolvency of the person against whose demand a counterclaim is sought will justify equitable interference in cases not provided for by statute. *Le Clare v. Thibault*, 601.

SEVERABLE DECREE. See APPEAL, 1.

SILENT PARTNER.

Rights of as Against Firm Partners. See PARTNERSHIP, 1.

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STATE CONSTITUTION. Same as CONSTITUTION OF OREGON.

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STATE LAND BOARD.

Implied Power of to Sell Notes and Mortgages. See STATUTES, 10.

STATUTE OF FRAUDS.

ACTS NOT CONSTITUTING PART PERFORMANCE.

1. To constitute such a part performance of a parol contract for the sale of personal property at a price of more than \$50 as to take the transaction from under the inhibition of the statute of frauds (Hill's Ann. Laws, § 785, subd. 5), the acts relied upon must have reference to the contract, and have been done solely with a view to its performance; acts preliminary or ancillary to the agreement are not sufficient. This case illustrates this rule: Plaintiff was president and business manager of a corporation, and the owner of a large amount of stock, including several shares of treasury stock. Defendant agreed to purchase plaintiff's entire holding, plaintiff agreeing to surrender the treasury stock for cancellation on repayment to him by the corporation of the amount paid therefor. Plaintiff's certificates of stock, and two notes against plaintiff, which defendant had agreed to take up and deliver to plaintiff as part of the consideration, and which had actually been purchased by defendant, were turned over to an attorney to enable him to reduce the contract to writing, but not for the purpose of having either notes or stock delivered to plaintiff or defendant. Plaintiff resigned as an officer of the corporation, and testified that such action was in reliance on defendant's promise to complete the contract, and that his acquiescence in a resolution canceling his treasury stock was for the same reason, while defendant's evidence was to the effect that plaintiff's resignation was because of dissatisfaction with his conduct of the business, and that the treasury stock was canceled because illegally issued. *Held*, that the delivery of the stock and notes for the purpose for which they were delivered, and plaintiff's resignation, and acquiescence in the cancellation of the stock, under the conflicting evidence as to the cause thereof, did not constitute a part performance of the contract, removing it from the operation of the statute of frauds, and entitling plaintiff to specific performance.

Reynolds v. Scriber, 407.

FRAUDULENT INTENT NO SUBSTITUTE FOR PART PERFORMANCE.

2. The fact that defendant's motives may have been fraudulent, or that his action has inflicted a wrong on plaintiff, is not ground for the interposition of equity, in the absence of part performance.

Reynolds v. Scriber, 407.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES.

SPECIAL OR LOCAL LAW.

1. The barber law of 1901, making it a misdemeanor to carry on the business of barbering on Sunday, and providing a penalty for so doing (Laws, 1901, p. 17), is not a special or local law for the punishment of crimes and misdemeanors, as prohibited by Const. Or. Art. IV, § 23, subd. 2, because, first, it is not a law at all for the punishment of offenses, and, second, because it applies alike to every locality in the state.

Ex parte Northrup, 489.

AMENDMENT BY IMPLICATION—DIVORCE FEES.

2. Since the act of 1899, placing district attorneys on a salary and cutting off all fees and compensation except their salaries (which does not apply to Multnomah County), the district attorney fee in divorce cases required by Section 1074 of Hill's Ann. Laws, need not be paid, as the later act (Laws, 1899, pp. 184, 185, § 3), repeals section 1074 by implication in its application to all counties except Multnomah.

Howard v. Clatsop County, 149.

*STATUTES—CONTINUED.

AMENDMENT BY IMPLICATION—ATTACHMENT AND EXECUTION.

3. The 1899 amendment of Section 149 of Hill's Ann. Laws, relating to attachments (Laws, 1899, p. 231, § 1), repealed by implication so much of section 238, subd. 4, as directed the omission to file a certificate by the sheriff—for now an execution can be levied only by filing a certificate. *Advance Thresher Co. v. Esteb*, 469.

AMENDMENT BY IMPLICATION—SURETIES ON APPEAL BONDS.

4. A re-enactment of a former statute is to be read as part of the earlier and not of the new one, if the latter is in conflict with another act passed after the former but before the latter act, and therefore does not impliedly repeal the intermediate act; for example, an old act provided that the qualifications of sureties on appeal bonds should be the same as in case of bail on arrest, and that they should justify in like manner if excepted to. In 1899 a law was passed authorizing surety companies to become surety on all classes and kinds of bonds, and providing that an undertaking executed by a licensed surety company should be a full compliance with all laws and requirements as to qualification and justification of sureties; and a few days later in the same session another act was passed relating to the taking of appeals, modifying the manner of giving and serving notice, but re-enacting the old statute as to sureties. Then in 1901 there was still another act again changing the method of giving and serving both the notice of and undertaking on appeal, but continuing the old provisions as to the qualification and justification of sureties. *Held*, that the modifications of 1899 and 1901, being merely re-enactments of the law as it stood before the passage of the first act of 1899 authorizing surety companies to become sureties on undertakings in appeal, do not impliedly repeal that act, but were intended only to change the manner of giving notice of an appeal, and to require the undertaking to be served on the adverse party. *Small v. Lutz*, 570.

IMPLIED AMENDMENT OF STATUTE—INTOXICATING LIQUORS.

5. Act February 20, 1891 (Laws, 1891, p. 79), enacting that if any minor over the age of sixteen shall, for the purpose of inducing any person to give or sell him intoxicating liquor, represent that he is twenty-one years of age, he shall be punished, does not impliedly modify or affect section 1913, making it a misdemeanor to sell liquor to minors.

State v. Gulley, 318.

REPEAL BY IMPLICATION.

6. Under the familiar rule that where there are repugnant acts upon the same subject, and the latest one revises the subject in such a way as to plainly evidence a legislative intention to substitute it for the earlier law or laws, the latest law repeals the others by implication, it must be held that the law of 1901 relating to fishes and fishing (Laws, 1901, pp. 328, 349), repealed the law of 1898 *in toto*. *Reed v. Dunbar*, 509.

GENERAL RULES OF STATUTORY CONSTRUCTION.

7. Proceedings not according to the course of the common law, by which the title of property may be divested, must be conducted with at least a full compliance with the statute; and where a special power is granted, and a mode prescribed for its exercise that mode must be essentially followed or the proceedings will be void. The acts required by the prescribed mode are conditions precedent to a valid exercise of the power conferred.

Bank of Columbia v. Portland, 1.

STATUTES—CONCLUDED.

MORTGAGING PROPERTY OF ESTATES—TITLE OF ACT.

8. The statute of 1898 authorizing executors and administrators to redeem real estate property sold on foreclosure or execution, and providing that the executor or administrator, with the consent of the county court, may borrow money on estate real property, and execute a mortgage thereon for the purpose of funding the indebtedness against the estate (Laws, 1898, p. 34, §§ 1, 2), is not in conflict with Const. Or. Art. IV, § 20, providing that every act shall embrace but one subject and matters properly connected therewith; the subject of this act being the granting of power to executors or administrators to borrow money on the property of the estate, and the other power, that of redemption, being a mere incident thereto. *Lawrey v. Sterling*, 518.

MEANING OF "CONSECUTIVE" PUBLICATION—STATUTES.

9. Under the provision of the act of 1899, relating to publication of notices (Laws, 1899, p. 233, § 1), a publication is "consecutive" if it is published on successive days, Sundays excepted; thus, a notice required to be published for ten consecutive days in a daily paper is sufficiently published when it has appeared in each successive issue from the fourth to the fifteenth of a month in a paper issued every day except Sunday. *Bank of Columbia v. Portland*, 1.

POWERS IMPLIED FROM THOSE CONFERRED.

10. Where a right or power is granted by statute, the means of using the power conferred so as to make it available are also conferred by implication. *Lawrey v. Sterling*, 518.

See HUSBAND AND WIFE and USURY.

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TACKING Different Holdings. See ADVERSE POSSESSION.

TAXATION.

EFFECT OF ASSESSING AND SELLING SEPARATE LOTS EN MASSE.

1. The general scheme of taxation in force in Oregon in the years 1895 and 1896, as indicated by Hill's Ann. Laws, §§ 2815, 2816, 292, 2770, 2814, 2823, 2825, 2826, 2838, was one requiring separate parcels of realty to be separately listed for taxation, and where lots widely separated are listed and sold together for a lump sum the proceeding is void, and a tax deed based on such an assessment conveys no title.

Brentano v. Brentano, 15.

OVERCOMING PRESUMPTION OF REGULARITY OF TAX DEED.

2. Though, under Hill's Ann. Laws, § 2823, making a tax deed *prima facie* evidence of the regularity of the proceedings, the burden is on the person attacking a deed to prove the irregularity, the return of the sheriff on the tax roll showing such fact is sufficient to vitiate the deed.

Brentano v. Brentano, 15.

REDEMPTION FROM TAX SALE—TENDER OF SUM DUE.

3. Hill's Ann. Laws, § 2846, provides that where land is conveyed prior to the date of the warrant authorizing the collection of taxes thereon the grantee shall pay the taxes. *Held*, that where two-thirds of a tract of land was conveyed to defendants before the date of the warrant, and the whole tract was afterwards purchased by them at a sale for taxes, which was void for irregularity, a tender to defendants of one-third of the amount of the tax was sufficient to authorize the owner to bring suit to cancel the deed.

Brentano v. Brentano, 15.

TAXING COSTS. See COSTS AND DISBURSEMENTS.

TENANCY FROM YEAR TO YEAR.

Creation of by Holding Over After End of Lease. See LAND AND TEN. 3.

TENANTS IN COMMON.

RELATIONSHIP OF WHEAT DEPOSITORS IN A WAREHOUSE.

The owners of different lots of wheat deposited in a warehouse are tenants in common of the commingled wheat, having such an undivided interest therein as the quantity stored by each bears to the total amount deposited.

Tobin v. Portland Mills Co. 269, 274.

TENDER.

TENDER AS AN ADMISSION OF LIABILITY—PLEADING.

The fact that a party or his attorney admits in court a liability to defendant, or makes a tender of a definite sum, is not sufficient to justify a judgment for plaintiff, unless the pleadings show a cause of action—a judgment must rest finally on the pleadings. *Philomath v. Ingle*, 289.

TERM OF COURT.

Power to Set Aside Judgment After Adjournment. See JUDGMENT, 1.

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Counterclaim May be Based on a Tort. See SET-OFF, 3.

TRESPASS by Cattle on Unfenced Land. See ANIMALS.

TRIAL.

ORDER OF HEARING WITNESSES.

1. Where evidence was offered in chief and erroneously excluded, admitting it in rebuttal, with permission to produce evidence to meet it, and allowing it to go to the jury as a part of the case in chief, is not an abuse of the court's discretion. *State v. Warren*, 348.

OBJECTION—STATEMENT OF EXPECTED ANSWER.

2. Statement of counsel on the refusal of the court to allow witness to testify to conversation with H, who made a transfer of property to A, claimed to be fraudulent: "I wish to show that H made certain declarations * * concerning the assignment * * a few days prior to the transfer to A. In this proceeding we are obliged to show the fraudulency of the transaction, and one of the principal things we must prove is that H transferred this stock with fraudulent intent."—sufficiently shows what was expected to be proved by the answer to allow a review of the ruling. *Beers v. Aylsworth*, 251.

EFFECT OF WITHDRAWING IMPROPER EVIDENCE—HARMLESS ERROR.

3. Error in admitting evidence is cured by directing the jury to disregard it; but the instruction must make clear the evidence referred to, and a general statement that a certain kind of testimony is not to be considered will not be sufficient.

State v. Aiken, 294; *State v. Howard*, 50.

LIMIT OF LEGITIMATE ARGUMENT OF COUNSEL.

4. Where there was evidence tending to show that defendant and his partner were allied in some manner with the makers of the notes upon which plaintiff's action was brought, and that all were engaged in a common purpose to obtain money on the credit of irresponsible parties, it was not an unwarranted abuse of privilege for counsel to designate defendant and his partner as vultures and wolves, and as fit subjects for the penitentiary, and by permitting such invective the court did not so abuse its discretion in regard to control of counsel and their arguments as to warrant a reversal of a judgment in favor of plaintiff.

Huber v. Miller, 103.

LATITUDE IN ARGUMENT OF COUNSEL.

5. Much latitude must necessarily be allowed counsel in presenting a case to the jury, but so long as the argument is confined to the facts and legitimate deductions therefrom, it is not objectionable; thus, a reference to plaintiff as a poor laborer, whose brow was wet with honest sweat, and whose horny hands were rough from toil, coupled with a designation of plaintiff's grantor as a rich and grasping lawyer, is not an abuse of the privilege of counsel. *Crossen v. Oliver*, 505.

MOTION FOR NONSUIT—PROVINCE OF JURY.

6. The jury being the judges of the facts, the court should not decline to submit a case if the plaintiff's testimony tends, even remotely, to support the allegations of the complaint. *Chapron v. Portland Electric Co.* 39; *Huber v. Miller*, 103; *Baines v. Coos Bay Navigation Co.* 135.

DIFFERENCE BETWEEN DIRECTING A VERDICT AND A NONSUIT.

7. If a verdict is directed in favor of defendant it precludes another action for the same cause, which is not the case where a motion is allowed to take the case from the jury for insufficiency of plaintiff's evidence. *Huber v. Miller*, 103.

ORDERING VERDICT FOR DEFENDANT.

8. In some cases the courts are justified in directing a verdict for the defendant after all the evidence has been submitted, but there must have been more of a defense than a contradiction of the plaintiff's case—to direct a verdict on a mere contradiction would be to determine the weight of the evidence, which a judge has no right to do.

Huber v. Miller, 103; *Stager v. Troy Laundry Co.* 141.

TRIAL—CONTINUED.

REFUSING DUPLICATE INSTRUCTIONS.

9. A judge may properly refuse to give requested instructions that are covered by his general charge. *State v. Sally*, 366.

SPECIAL INSTRUCTIONS SHOULD BE REQUESTED.

10. Where counsel desire an instruction covering a particular point, or given in an especial manner, it should be requested, otherwise error cannot be assigned for not giving it. *State v. Meldrum*, 380.

INSTRUCTIONS SHOULD RELATE TO THE ENTIRE EVIDENCE.

11. It is not good practice for a trial judge to single out the testimony of a single witness, or the testimony on one point, and instruct the jury that it is not sufficient to warrant a verdict, when there is other testimony that may properly be considered in the same connection. The following is an example of the impropriety of such practice: In an action to recover land, defendant claimed title as purchaser under a judgment in his favor against a former owner; and plaintiff claimed under a deed from such owner executed prior to the judgment, but not recorded until after the judgment was docketed. The former owner testified that she told defendant before his judgment was rendered that she had sold the land, and there was other evidence that plaintiff was in possession thereof when such judgment was rendered. *Held*, that an instruction that the former owner's mere statement that she had sold the land, without any indication as to whom she had sold it, was not sufficient notice to prevent defendant from being a purchaser without notice, was properly refused, as being upon a single item of testimony, when there was other testimony on the same subject. *Crossen v. Oliver*, 505.

INSTRUCTIONS SHOULD NOT BE INDEFINITE.

12. Where plaintiff's and defendants' land was in one inclosure, and plaintiff undertook to construct a partition fence, but was prevented by defendants, who claimed that he was building the fence on their land, and not on the line, an instruction that, if he attempted to erect a partition fence on the line between his and defendants' land, "or approximately so," and was prevented by defendants, they would be liable for any damage he suffered on account of the trespass of their stock, was error, for it left the construction of the word "approximately" to the jury. *Oliver v. Hutchinson*, 443.

TRIAL BY THE COURT—FINDINGS MUST COVER MATERIAL ISSUES.

13. It is a rule now well established in Oregon that where a law action is tried to a court without a jury findings of fact must be made on all material issues, otherwise the judgment cannot stand: as an example, in an action to recover for a monument contracted to be delivered by plaintiff to defendant, plaintiff is not entitled to recover as for a breach of the contract, without a finding that the monument was of the kind called for by the contract, or that it was such as defendant was bound to accept. *Wright v. Ramp*, 285.

TRIAL BY THE COURT—FINDINGS MUST FOLLOW PLEADINGS.

14. Where law actions are tried before a court without a jury the findings must follow and be limited by the pleadings—while they should cover every material issue of fact, they should not be made on other issues. *Male v. Schaut*, 425.

TRIAL—CONCLUDED.

TRIAL BY THE COURT—IMMATERIAL FINDING.

15. In an action on a note, the answer alleged that the note, secured by mortgage, was indorsed by the payee to a trust company; that the holder of a prior mortgage on the land brought a foreclosure proceeding, in which the trust company was made a party, and answered, setting up the mortgage given to secure the note; and that a decree was rendered satisfying the note in full. The reply denied that the mortgage was ever foreclosed, or that the trust company was a party to the suit to foreclose the prior mortgage, and averred that the pretended answer was filed without its knowledge or consent. The court found that, though the trust company was not bound by the decree in the foreclosure suit, the appearance of the attorney on its behalf having been unauthorized, yet it had subsequently ratified his acts, and the mortgage could not, therefore, be disregarded, and suit brought on the note, and accordingly gave judgment for defendant. *Held*, that, as the finding with respect to ratification was without the issues, it could not sustain the judgment.

Male v. Schaut, 425.

TRIAL BY THE COURT—PRESUMED VERITY OF RECORD.

16. An objection that the court erred in rendering a decree without proof of any of the material allegations in the complaint denied by the answer is untenable where the findings of fact recite that they were made from "the admission of the pleadings and the evidence taken," since such recital imports verity and precludes inquiry.

Martin v. Eagle Development Co. 448.

STRIKING OUT TESTIMONY FOR USING MEMORANDUM.

17. Where a witness testified in chief independently of any memorandum, the fact that on cross-examination he testified as to other matters exclusively from a memorandum which also related to the subject of his testimony in chief was not ground for taking his testimony in chief from the jury.

State v. Warren, 348.

TROVER AND CONVERSION.

CONVERSION BY AGENT—TROVER.

1. Where an agent's contract of employment requires him to turn over to his principal the identical moneys collected in the course of his employment, trover may be maintained by the principal against him for the conversion of moneys collected. *Salem Traction Co. v. Anson*, 562.

TROVER—DESCRIPTION OF MONEY CONVERTED.

2. In actions of trover for the conversion of money collected by an agent the complaint need not particularly describe the money, but it will be sufficient to state the aggregate amount taken.

Salem Traction Co. v. Anson, 562.

TROVER—SUFFICIENCY OF EVIDENCE.

3. In trover for the conversion of moneys collected by defendant as plaintiff's agent, the evidence showed that the books of account were kept under the direction of the defendant; that they indicated that certain moneys due the plaintiff were collected from the state and from a county, and not accounted for by him; and that two false entries had been made therein by the defendant's direction, crediting one account with large sums and charging the same to stores, when in fact no stores had been purchased. The defendant gave no evidence on the trial whatever, and did not undertake to explain any of these circumstances, or account for the false entries in the books. *Held*, that the evidence sustained a verdict for plaintiff.

Salem Traction Co. v. Anson, 562.

TRUSTS.

TERMINATION OF MORTGAGE TRUST—RIGHTS OF TRUSTEE.

1. A mortgagor on the date of the mortgage deeded the property covered thereby to a trustee, the latter to take possession and collect the rents and profits, and apply them to interest, taxes, etc. The deed obligated the trustee to make certain advances for the benefit of the mortgagor. The life of the trust was made dependent on the existence of the mortgage, and the trustee was given a lien for advances made. *Held*, that foreclosure of the mortgage terminated the trust, and, where made a party defendant to the foreclosure suit, the trustee was entitled to file a cross complaint seeking to have its own lien foreclosed.

United States Mortgage Co. v. Marquam, 391.

CONSTRUCTION OF MORTGAGE TRUST AGREEMENT.

2. The trust contract and agreement executed between the trustee and the defendants herein did not require the trustee to make advancements to pay interest on the mortgage loan.

United States Mortgage Co. v. Marquam, 391.

UNDERTAKING on Appeal.

Right of Licensed Surety Company to Sign. See **APPEAL**, 8.

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USURY.

PAYING INTEREST, TAXES AND OTHER CHARGES.

Under Section 3593 of Hill's Ann. Laws, providing that contracts made in this state on which the rate of interest is eight per cent or less, whereby one party shall agree to pay the taxes on the debt, credit or mortgage, shall not be usurious, parties may lawfully contract to pay the taxes, and any or all other charges or rates that may be mutually agreed upon, provided all such charges and the interest together, exclusive of the taxes, do not exceed eight per cent.

United States Mortgage Co. v. Marquam, 391.

VACATING JUDGMENT.

Void Judgment May be Vacated at Any Time. See **JUDGMENT**, 2.

VARIANCE. See **PLEADING**, 10, 11.

VENDOR AND PURCHASER.

DEFECT OF PARTIES—FORECLOSING LIEN BY ADMINISTRATOR.

1. That a bill by an administrator to foreclose the equitable interest in lands sold by his intestate does not make the heirs of the intestate parties is not an objection after answer, the administrator alleging his readiness to furnish a good and sufficient deed.

Wollenberg v. Rose, 314.

REPUDIATION BY VENDEE.

2. Where a verbal contract for the sale of land called for a bond for a deed, and one was not given, but the vendee went into possession, and made payments on the purchase, the vendee will not be permitted, in equity, to repudiate the contract.

Wollenberg v. Rose, 314.

VENDOR AND PURCHASER—CONCLUDED.

REMEDY OF STRICT FORECLOSURE BY VENDOR.

3. Where a verbal contract for the sale and purchase of land has been carried out to the extent of full delivery of possession, which the vendee retains, the contract will be strictly foreclosed in a court of equity; and it is immaterial that a bond for a deed was never delivered by the vendor as agreed upon, after taking and retaining possession.

Wollenberg v. Rose, 314.

STRICT FORECLOSURE—MUTUAL REQUIREMENTS OF DECREE.

4. When, in a suit by the vendor of land to foreclose the vendee's equitable interest, the decree requires that the defendant pay the amount due within ninety days or be foreclosed of his interest, it should require plaintiff to execute a sufficient deed contemporaneously with the payment, or suffer a dismissal of the bill.

Wollenberg v. Rose, 314.

CONSTRUCTIVE NOTICE OF UNRECORDED DEED.

5. A mortgage from a stranger to the record title is not constructive notice to an intending purchaser of a prior unrecorded deed; nor is the fact that the property is assessed to another than the record owner such notice.

Advance Thresher Co. v. Esteb, 469.

CERTIFICATE OF LEVY OF EXECUTION AS NOTICE TO PURCHASER.

6. The filing and recording of a certificate of levy of execution against land as the property of one not a record owner, no record owner being a party to the action in which judgment was obtained, is not constructive notice to a purchaser from the record owner of a prior deed to the execution defendant, no one representing the grantee in the unrecorded deed being in possession.

Advance Thresher Co. v. Esteb, 469.

VENDOR AND PURCHASER—EFFECT OF QUITCLAIM DEED.

7. A grantee in a bargain and sale deed may be a *bona fide* purchaser, as the form of the conveyance is immaterial.

Advance Thresher Co. v. Esteb, 469.

BURDEN OF PROOF TO SHOW NOTICE OF EQUITABLE TITLE.

8. A plaintiff in an action of ejectment, claiming under a deed unrecorded when defendants obtained the legal title, has the burden of showing that they had notice of his title.

Advance Thresher Co. v. Esteb, 469.

VENUE.

Necessity of Alleging Venue of Detention in Replevin Actions—Waiver of by Answering Over. See **REPLEVIN**, 2.

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Waiving Defect of Parties by Pleading to the Merits. See **PARTIES**, 2.

WAREHOUSEMEN.

BAILMENT—LIABILITY OF PURCHASER.

1. Though a warehouseman in whose warehouse wheat was deposited purchased it whenever the depositors chose to dispose of it, and shipped it, and the agents of those to whom it was shipped believed he had authority to dispose of wheat delivered to them, such persons obtained no title to wheat delivered to them without the authority of the depositors, and should account to the depositors for the wheat for which they are legally responsible, in proportion to that part of the deficiency which they severally caused. *Tobin v. Portland Mills Co.* 269.

DEPOSIT WITH WAREHOUSEMAN—BAILMENT—SALE.

2. Where owners of wheat delivered it to a warehouseman, receiving either warehouse receipts reciting the receipt of wheat subject to warehouse charges for sacks and storage at a certain sum per bushel, and stored at owner's risk of loss by fire, or load checks reciting the receipt of wheat stored at owner's risk unless specially insured,—the owners expecting either to sell to the warehouseman, or secure the return of a like quantity and quality of wheat, upon demand and payment of the storage charges,—the deposits were not sales, instead of bailments, and did not pass title to the warehouseman. *Tobin v. Portland Mills Co.* 269.

WATERS.

WATERS FOR IRRIGATION—PRIVITY WITH APPROPRIATORS.

1. Where persons who divert water do not surrender their rights to a company, but it is organized merely to facilitate distribution of the water among them, there is such a privity as to enable it to defend in their behalf. *Oregon Construction Co. v. Allen Ditch Co.* 209.

PRESCRIPTIVE RIGHT TO WATER.

2. As against riparian owners, one who diverts water may acquire title by prescription in the same time necessary to acquire title to land by adverse possession. *Oregon Construction Co. v. Allen Ditch Co.* 209.

USE OF WATER—APPROPRIATION—TITLE BY RELATION.

3. When the appropriation of a water right is initiated by the posting of a notice, the statute of limitations will begin to run at the date of the posting of such notice, but when it is initiated by an actual diversion without a notice, the statute is set in motion on the date of the diversion, provided in both instances that there is an application to a beneficial use within a reasonable time. *Oregon Construction Co. v. Allen Ditch Co.* 209.

PRESCRIPTION—WHEN STATUTE OF LIMITATIONS BEGINS.

4. Prescription begins to run from the time one diverts water, though there is not then an actual use thereof, provided there is actual and exclusive possession and control with intent to use it, followed by actual use within a reasonable time.

Oregon Construction Co. v. Allen Ditch Co. 209.

ADVERSE USE—EFFECT OF OBJECTIONS.

5. Continuity of holding by persons who divert water is not interrupted by objection being made thereto, no attention being given to the objection. *Oregon Construction Co. v. Allen Ditch Co.* 209.

CONTINUITY OF ADVERSE HOLDING.

6. There is no interruption of the continuity of holding of persons who divert water because others make a diversion by a canal into which for a while their water flows for a short distance, they again taking up the water and using it in defiance of the others' claims.

Oregon Construction Co. v. Allen Ditch Co. 209.

WHEAT Depositors in a Common Warehouse.

Relationship of Owners of Commingled Wheat. See TEN. IN COM.

Liability and Title of Purchasers of Such Wheat. See WAREHOUSEMEN, 2.

WITNESSES.

CROSS-EXAMINATION—HARMLESS ERROR.

1. Cross-examination is intended to develop more fully matters testified to on direct examination, and will not be permitted to extend to other questions; but error in this respect will not be cause for reversal where the same witness is afterward called by the cross-examining party, for then an opportunity has been afforded to develop at length the questions excluded before. *Simmons v. Oregon Railroad Co.* 151.

CROSS AND REDIRECT EXAMINATIONS.

2. Where the defense on cross-examination of one of the state's witnesses, elicited the fact that such witness had had a fight with defendant, it was competent on redirect examination of such witness to show the cause of the fight, as bearing upon the bias of the witness.

State v. Warren, 348.

IMPEACHMENT BASED ON IRRELEVANT MATTERS.

3. Generally speaking, a party who has brought out irrelevant or immaterial testimony is bound thereby and will not be permitted to afterward contradict the witness on that subject, but there is no such restriction on the right of impeachment when the testimony is relevant, for example, where, in a prosecution for larceny of a horse, an issue is raised as to whether defendant purchased the animal from the complaining witness, questions asked the complaining witness on cross-examination as to his having stated to persons named that he sold the animal to defendant are relevant, and defendant is not bound by his answers, but may contradict him in the proper way. *State v. Deal*, 437.

FOUNDATION FOR IMPEACHMENT OF WITNESS.

4. Under Hill's Ann. Laws, § 841, providing that, before a witness can be impeached by evidence of inconsistent statements, such statements must be related to him, and he be permitted to explain them, a foundation for impeachment was laid where complaining witness, after testifying that he had traded three horses to defendant, but not the one in question, was asked if he had not, at a designated time and place, stated to a person named that he had traded the horse in question to defendant, to which he answered "No." *State v. Deal*, 437.

EXAMPLE OF GOOD FOUNDATION FOR IMPEACHMENT.

5. A foundation for impeachment was also laid when the complaining witness was asked if, at a designated time and place, he had not stated to a person named that he had traded four horses to defendant, to which he answered "No." *State v. Deal*, 437.

Fees of Witnesses and Objections Thereto. See COSTS, 2, 3, 4.

Names of Witnesses on Informations. See CRIMINAL LAW, 23.

WORDS AND PHRASES.

"CONSECUTIVE."

Under the provision of the act of 1899, relating to publication of notices (Laws, 1899, p. 233, § 1), a publication is "consecutive" if it is published on successive days, Sundays excepted; thus, a notice required to be published for ten consecutive days in a daily paper is sufficiently published when it has appeared in each successive issue from the fourth to the fifteenth of a month in a paper issued every day except Sunday.

Bank of Columbia v. Portland, 1.

"DISTRAINED."

The meaning of the word "distrained" as used in Hill's Ann. Laws, § 42, subd. 2, designating the venue of actions for the recovery of personal property "distrained for any cause," is a holding of the personal property of another for any purpose or for any cause.

Byers v. Ferguson, 77.

WORDS AND PHRASES—CONCLUDED.

"FROM THE GRASS ROOTS DOWN."

This expression ordinarily means to the centre of the earth, and not merely to bedrock. *Martin v. Eagle Development Co.* 448.

"FUNDING."

This term, as used in Laws, 1898, p. 34, § 2, authorizing an executor or administrator to borrow money for the purpose of "funding" the indebtedness against the estate, does not necessarily imply a division of the indebtedness among several persons, but evidently means the borrowing of enough money to pay the indebtedness of the estate, whether there be one claim or many. *Lawrey v. Sterling*, at p. 530.

"LONG ACCOUNTS."

Where it fairly appears by affidavit, or upon the face of the pleadings, that so many separate and distinct items will be litigated or examined that a jury cannot keep the evidence in mind in regard to each item, it may be said that the accounts are "long."

Salem Traction Co. v. Anson, 562.

"PETITION."

This word, as used in a statute, generally means a written application addressed to a court or judge, praying for the exercise of some judicial power; or a writing addressed to a public officer requesting the performance of some duty enjoined upon him by law, or urging the exercise of some discretion with which he is vested. *Lawrey v. Sterling*, at p. 525.

"PROSPECT."

This word ordinarily means to do experimental work to ascertain the probable value of a mining claim, and not to accurately ascertain the actual value by sinking holes to bedrock and testing the earth.

Martin v. Eagle Development Co. 448.

Ex. 3.46.



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